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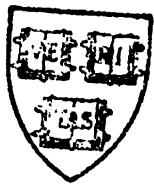
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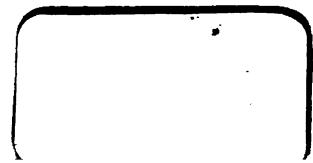
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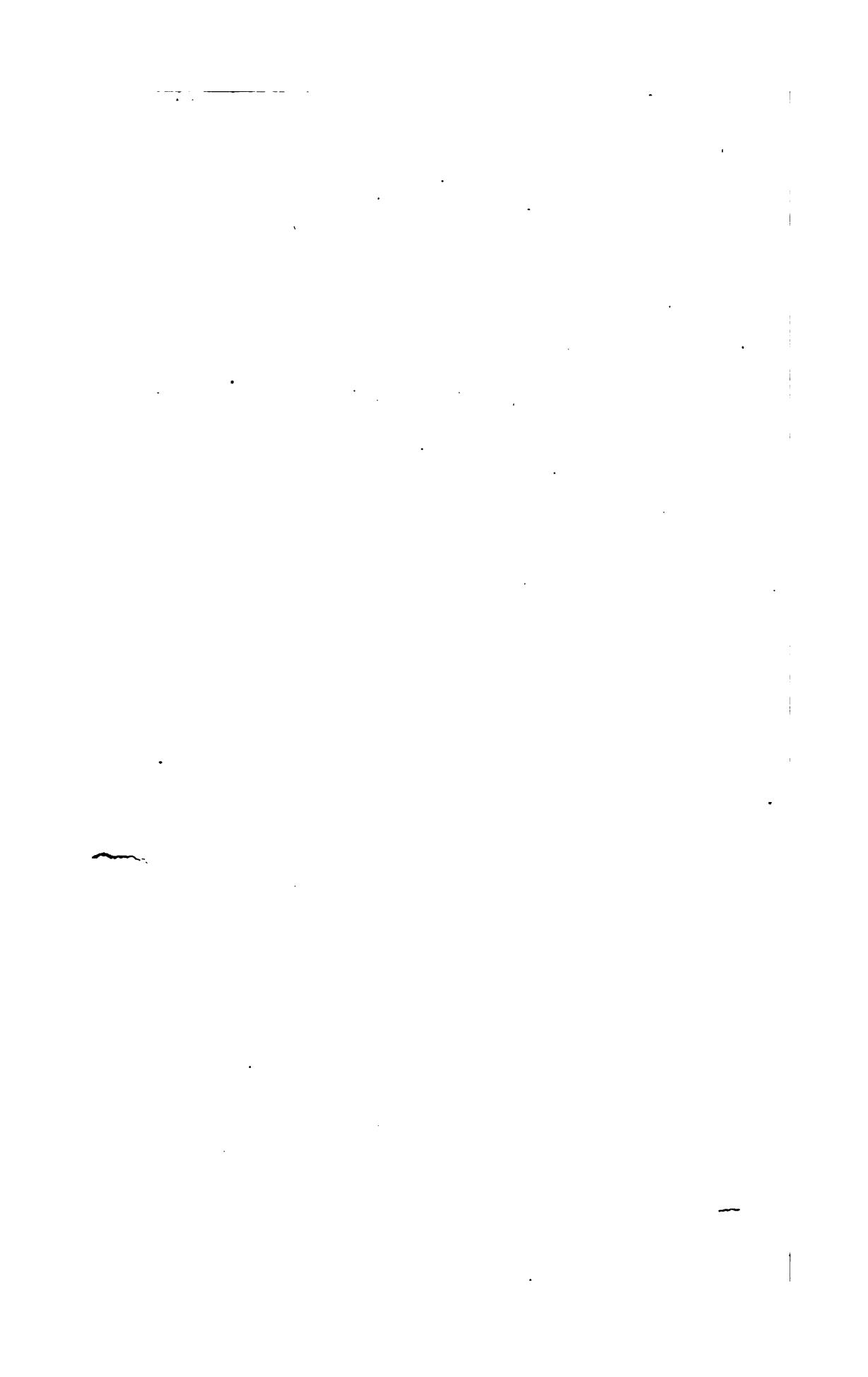


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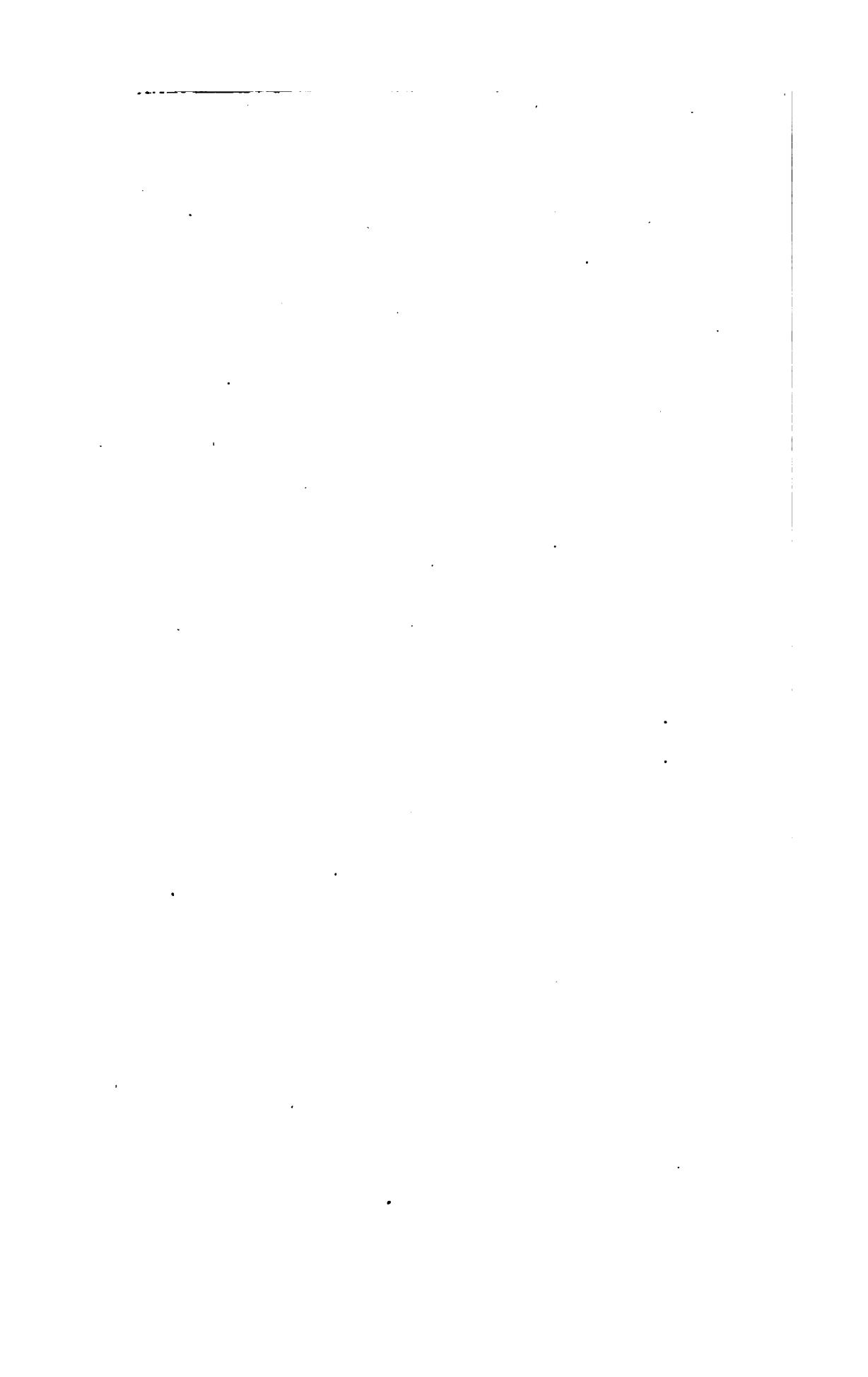


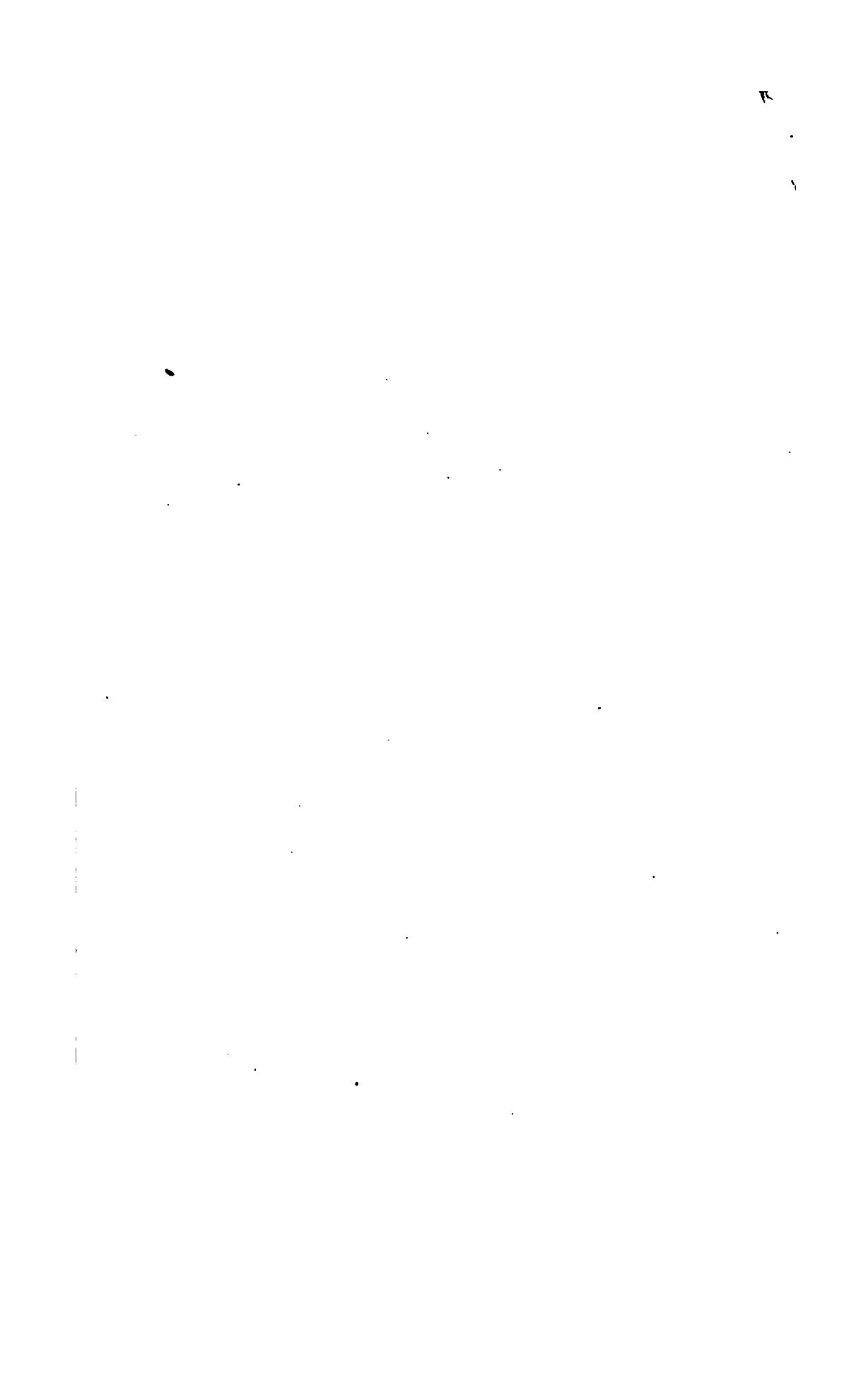
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY JAMES B. BLACK,

OFFICIAL REPORTER.

VOL. XXX.

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM,
1868, AND SOME OF THE CASES DECIDED
AT THE MAY TERM, 1869.

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1869.

Entered, according to the act of Congress, in the year 1869, by
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District of Indiana.

Rec Dec 27., 1869

JUDGES
OF THE
SUPREME COURT OF JUDICATURE
DURING THE TIME OF THESE REPORTS.

CHARLES A. RAY, LL. D.*
JEHU T. ELLIOTT, LL. D.†
JAMES S. FRAZER, LL. D.
ROBERT C. GREGORY, LL. D.

*Chief Justice at the November Term, 1868.
†Chief Justice at the May Term, 1869.

**For previous decisions of the Supreme Court of this State,
overruled, affirmed, or modified, see INDEX, tit. CASES
OVERRULED, &c.**

RULES
OF THE
SUPREME COURT OF INDIANA.

MOTIONS.

RULE 1.—Motions are to be made immediately after the orders of the preceding day are read, and the opinions of the court of the current day are delivered; and at no other time, unless in cases of necessity, or in relation to a cause when called in course.

RULE 2.—Motions are to be made by the counsel in the order in which their names stand on the record; but no one is to make more than one motion at a time.

RULE 3.—When a motion is founded on a matter of fact, which is not admitted, or apparent on the record, it must be supported by affidavit.

RULE 4.—All motions made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

RULE 5.—On motions and collateral questions, unless by special permission, but one counsel will be heard on each side.

RULE 6.—No motion shall be argued unless the court shall so direct; but the parties may present a brief.

REHEARING.

RULE 7.—Rehearings must be applied for by petition in writing, setting forth the grounds on which the judgment is claimed to be erroneous. The court will consider the petition without oral argument, unless otherwise ordered by the court on its own motion.

SUBMISSION OF CAUSES.—ABSTRACT.

RULE 8.—When a cause, appealed in vacation, is called, which has been docketed in this court more than ninety days before the term, and there is no appearance for the defendant (process not having been served ten days, nor taken out sixty days before the term), the suit shall be dismissed.

RULE 9.—If, in a cause appealed in term below, the transcript be filed on or before the first day of the term of this court, or if, in an appeal in vacation, the process be served ten days before the term, the parties must be ready when the cause is called.

RULE 10.—The party bringing the cause into this court shall file, with the transcript, or, where the transcript is filed for a supersedeas, within ten days, and on or before the first day of the term at which the cause stands for trial,

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two copies of a complete abstract, printed or plainly written, of so much of the transcript as is necessary to present the errors assigned and relied upon, referring in such abstract to the appropriate pages and lines of the pages of the transcript, by numerals; one of which copies of the abstract may be withdrawn by the counsel of the appellee, on application to the clerk and receipting therefor. A failure to comply with this rule shall entitle the appellee to have the case submitted, upon filing an abstract of any point presented by the assignment of errors and a brief for the use of the court; or the case may be continued at the appellant's cost; or the appeal may be dismissed, as the appellee may elect; but no case shall be submitted without a compliance with this rule.

RULE 11.—In case the appellant fails to comply with the foregoing rule, in any cause where the appellee shall assign cross-errors, the counsel for the appellee shall file, with such assignment of cross-errors, abstracts as required by the above rule, and a failure to do so shall be deemed a waiver of the cross-errors assigned.

RULE 12.—The counsel of the opposite party, if he be not satisfied with the abstracts filed, may file such further abstracts, in discharge of the rule, as he may deem to be required, upon the submission of the cause.

RULE 13.—All causes pending in the Supreme Court, if submitted within one year from the date at which they are filed, may be submitted upon plainly written or printed briefs. If not submitted within one year from the date of filing, except where interlocutory orders may excuse the delay, they will be dismissed on the call of the docket, unless submitted on printed briefs. In all cases the clerk shall note the filing of a brief, the party by whom it is filed, and place it in the record.

RULE 14.—No counsel will be permitted to speak, in the argument of any cause, more than one hour, without the special leave of the court.

RULE 15.—Counsel will not be heard orally, unless a plainly written or printed brief be first filed, of the points intended to be made, and the authorities intended to be cited in support of them, arranged under the respective points; and no other book or case shall be referred to in the argument. If one of the parties omit to file such a statement, he cannot be heard, except on the points made and authorities cited by the opposite party. Two printed or plainly written copies of the points and authorities required by this rule, shall be filed with the clerk, three days before the case is called for argument, one to be retained by the clerk, and the other for the counsel of the opposite party; and points and authorities in reply may be cited and filed at any time before the argument begins. When no counsel appears for one of the parties, and no printed or written brief or argument is filed, only one counsel shall be heard for the adverse party. But if a printed or written brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

RULE 16.—The causes will be called for argument, beginning with those from the first circuit, in the order in which the same shall have been docketed, and so continuing by circuits, in numerical order, on such days as the clerk, under the direction of the court, shall determine, of which notice shall be given.

RULES OF THE SUPREME COURT. ix

COMMUNICATIONS.

RULE 17.—Communications to any Judge concerning a pending cause must be in writing, for the inspection of all the Judges; and will be filed with the papers in the cause for the examination of all parties in interest.

NAMES OF PARTIES.—PROCESS.

RULE 18.—The assignment of errors shall contain the full names of the parties; and process, when necessary, shall issue accordingly.

APPEARANCES.

RULE 19.—Appearances to suits in this court shall be entered in the clerk's office in writing.

RULE 20.—A joinder in error, or the filing of an answer by the party in person, or by his attorney thereunto lawfully authorized, shall be deemed and taken as an appearance in writing under the above rule.

INTERCHANGE OF BRIEFS.

RULE 21.—Attorneys upon opposite sides will be required, upon request, to interchange briefs.

BILL OF EXCEPTIONS CONTAINING THE EVIDENCE.

RULE 22.—In every bill of exceptions purporting to set out the evidence, upon motion for a new trial overruled, it must be stated, in appropriate language, that all the evidence given in the cause is contained therein.

PROSECUTING ATTORNEY.

RULE 23.—Prosecuting attorneys will not be required to file printed briefs in cases wherein they appear as such for the defendant.

DISTRIBUTION OF CAUSES.

RULE 24.—After submission, the papers shall be delivered by the clerk to the chief justice, who shall have control thereof until the cause is decided in full bench, and the papers are delivered over to the judge who may be selected to prepare the opinion therein; and the chief justice shall keep a private memorandum of such disposition.

CLERK'S DUTIES.

RULE 25.—The clerk shall, at any time, on payment of proper fees, deliver to any party to a cause pending, a copy of the abstract or points made therein.

RULE 26.—The clerk shall enter upon the court docket, in a proper column, the fact, where such is the case, that the appeal was taken in term time, and duly perfected by filing the record within the time limited. When the appeal is not taken as above, the clerk shall note the date of service of process, or last publication of notice. If process has not been served, or notice given, that fact shall be noted.

OPINIONS, WHEN TO BE CERTIFIED, ETC.

RULE 27.—Opinions and judgments pronounced by this court shall not be certified to the lower court, by the clerk of this court, to be there operative under section 571, 2 R. S., 1852, except in criminal cases, until the expiration of sixty days, unless by order of this court, or on the filing of a waiver of a

x RULES OF THE SUPREME COURT.

petition for rehearing, which order of court or filing of waiver shall be certified by the clerk with the opinion.

APPEALS, ETC.

RULE 28.—Where an appeal is taken in term, as provided for in section 555 of the code, and the transcript is not filed in the office of the clerk of this court within the time limited by that section, the appeal so taken shall be deemed to have been abandoned; and if a transcript is afterwards filed, an appeal shall be considered as taken by the filing of the transcript, as provided for in the next following section of the code, and the appellee, in such case, shall not be regarded as in court, without notice or voluntary appearance.

RULE 29.—Where an appeal is taken after the close of the term, by notice below, as provided for by the first branch of section 556 of the code, the transcript must be filed within sixty days from the time of taking the appeal; otherwise the appeal so taken will be deemed to have been abandoned; and if a transcript is afterwards filed, an appeal shall be considered as taken by the filing of the transcript, as specified in the foregoing rule, and the appellee shall not be regarded as in court without further notice or voluntary appearance.

SUPREME COURT REPORTER.

RULE 30.—The opinions of this court shall not be delivered to the reporter until the expiration of sixty days from the determination of the cause, unless certified as provided in rule twenty-seventh; and in cases where petitions for rehearing are filed, the opinions therein shall not be delivered to the reporter until such petitions are overruled.

WITHDRAWAL OF PAPERS AFTER DISMISSAL.

RULE 31.—When an appeal shall have been dismissed, the transcript of the record of the court below shall not be withdrawn from the files of this court, to be used in another appeal, or for any other purpose, without special leave of the court, in term, or of a judge thereof, in vacation, and only on good cause shown by affidavit.

SUPREME COURT LIBRARY.

RULE 32.—No book belonging to the Law Library shall be removed from the Library Room, except to be taken for the purpose of oral argument into the Court or Consultation Room, when it shall be delivered to the court or returned to the library.

Any violation of this rule will be treated as a contempt of court.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1868, IN THE FIFTY-THIRD
YEAR OF THE STATE.

KNEFEL v. WILLIAMS.

PLEADING.—Abatement.—Pleas in abatement must be verified by oath or affirmation.

TEMPORARY BAR.—Rebellion.—Suit for rent, commenced October 12th, 1863. Answer, that from January 1st, 1862, till institution of action, plaintiff had been a citizen of Tennessee, and had been during said period, and still was, actively engaged in levying war against the government of the United States, and in aiding, abetting and upholding the late rebellion against said government, and during all said time had been an officer in the army of the so-called Confederate States, and had not obeyed the proclamation of the President, made in pursuance of the act of Congress of July 17th, 1862. (12 Stat. at Large, 589.)

Held, that this answer was good in bar by force of said act of Congress. **Held**, also, that the fact that the right of action might revive at the termination of the rebellion, is no objection to the rule that such pleas may be in bar of the action.

CONSTITUTIONAL LAW.—Confiscation.—The confiscation act of July 17th, 1862, is within the enumerated constitutional powers of Congress, and binding upon the state as well as the Federal courts.

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WAR POWER.—The law of nations imposes the only limit on the war power of the United States, and there is no difference in this respect between a foreign and a civil war.

JURISDICTION.—*Collateral Proceeding.*—The district courts of the United States had jurisdiction of a proceeding, under the act of 1862, for the condemnation and sale of property seized under said act; and errors in such proceeding cannot avail against a judgment therein, in a collateral proceeding in a state court.

APPEAL from the Floyd Circuit Court.

The appellee, who was the plaintiff below, sued the appellant for the rent of part of a lot numbered three, in the city of New Albany. He averred that he leased the premises to appellant, by a verbal agreement, from month to month, at the rate of twenty dollars per month, from July 1st, 1861. The suit was commenced October 12th, 1863.

The appellant answered in three paragraphs. The first was the general denial.

The second paragraph is as follows:—“The defendant answers the complaint of the plaintiff, and says that the plaintiff has not the legal capacity to sue in this action, in this, that from the first day of January, 1862, to the institution of this action, the plaintiff has been a citizen of the State of Tennessee, and has been during all said time, and now is, actively engaged in levying war against the government of the United States, and in aiding, abetting and upholding the present rebellion and insurrection against the government of the United States, and has been during all said time a colonel in the army of the so-called Confederate States; and said plaintiff did not, within sixty days after public warning and proclamation, duly given and made by the President of the United States, in pursuance of an act of Congress passed July 17th, 1862, entitled “an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,” cease to aid, countenance and abet said rebellion, and return to his allegiance to the United States; but continued during all said period, from January 1st, 1862, to the present time, in levying war against the government of the

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United States; wherefore the defendant prays judgment." This paragraph was filed November 6th, 1864.

The third paragraph substantially avers that appellant paid to appellee, before the commencement of the suit, all the rent that was due and owing from him to appellee for the premises described in the complaint up to April 30th, 1863, to wit, the sum of two hundred dollars, and he pleads this payment in bar of so much of the appellee's demand; and as to the residue, he avers that on said day the said premises were seized by the United States marshal for the district of Indiana, by virtue of a monition directed to him out of the District Court of the United States for the district of Indiana, which required him to seize and take the same into custody, and upon said day, and in the manner aforesaid, the said lease was determined, and he was evicted from the enjoyment of said property under the provisions thereof; that said marshal continued in the possession of said property until November 4th, 1863, when a decree was rendered in said District Court ordering said premises to be confiscated and forfeited to the United States, for the causes set out in the preceding paragraph; and further ordering the same to be sold; that afterwards, in the same month and year, the appellant purchased said premises, under said decree of sale, for six hundred dollars, and paid the marshal therefor; wherefore, &c.

A certified copy of the proceedings and decree of said District Court was filed with, and made a part of, the answer. Interrogatories were filed with the answer.

The appellee moved the court to strike out the second paragraph, for the reason that the same was a plea of matter in abatement, and did not precede the plea in bar. The court sustained the motion over appellant's exception. The appellee then demurred to the third paragraph for the fifth statutory cause, and he also moved to take from the files the interrogatories accompanying the answers. The demurrer was sustained over appellant's exception, and the

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motion to strike out the interrogatories was also sustained over his exception.

There was a trial and finding for the appellee; a motion of appellant for a new trial refused, and the ruling excepted to.

The errors assigned are: 1. Sustaining motion to strike out the second paragraph of answer. 2. Sustaining the demurrer to the third paragraph. 3. Overruling the motion for a new trial.

GREGORY, J.—The second paragraph of the answer was not sworn to, and it can, therefore, only be sustained on the ground that it is in bar, and not in abatement. This paragraph is in bar of the action, by force of the act of Congress of July 17th, 1862. The fifth section thereof is as follows:—

“Sec. 5. *And be it further enacted,* That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States, that is to say: First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States. * * * * * Sixthly. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section.” 12 U. S. Stat. at Large, 589.

That the right of action may revive at the termination of the rebellion, is no objection to the rule that such pleas may be in bar of the action. In *Bell v. Chapman*, 10 Johns.

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183, it was held that a plea of alien enemy, commorant abroad, was properly pleaded in bar, although the court say: "It is also admitted by the best modern authorities on the law of nations, that the plea of alien enemy is only a temporary bar to the recovery of private debts, and that the right of action returns with the return of peace."

It is objected that this law is unconstitutional. It is argued that this act is an act for the punishment of treason, and that it deprives the person implicated of a trial before the punishment. But we apprehend that confiscation acts stand on a much broader basis. Congress has power to "provide for the common defense and general welfare of the United States;" * * * "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" * * * "and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Const. U. S., art. 1, sec. 8. The act in question is clearly within the powers thus conferred on Congress.

"A civil war," says VATTEL, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms."

There is no limit on the war power of the United States, except such only as is imposed by the law of nations. And in this respect there is no difference between a civil and a foreign war. Congress has as much power to "suppress insurrections" as to "repel invasions." Resort may be had to any means known and recognized by the laws of war.

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It has been held, we think rightly, that this act is binding upon the state, no less than upon the Federal courts. *Norris v. Doniphan*, 3 Am. Law Reg. (n. s.) 471, per BULLITT, J., decided in the Kentucky Court of Appeals.

Did the court err in sustaining the demurrer to the third paragraph of the answer? This turns upon the validity of the judgment of the District Court. In *The Union Insurance Co. v. United States*, 6 Wall. (S. C.) 759, the Supreme Court of the United States, in a proceeding "to confiscate property used for insurrectionary purposes," under the act of August 6th, 1861, held that the Circuit Court had jurisdiction, under that act, of proceedings for the condemnation of real estate or property on land; and such proceedings might be shaped in *general* conformity to the practice in admiralty; that is to say, they may be in the form and modes analagous to those used in admiralty. But issues of fact, on the demand of either party, must be tried by jury; such cases differing from cases of seizure made on navigable waters, where the course of admiralty may be *strictly* observed.

The provisions of the act under which the property in question was sold are as follows:—

"Sec. 7. *And be it further enacted*, That to secure the condemnation and sale of any of such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court thereof, or in any territorial court, or in the United States District Court for the District of Columbia, within which the property above described, or any part thereof, may be found, or into which the same, if movable, may first be brought, which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases, and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property, and become the property of the

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United States, and may be disposed of as the court shall decree, and the proceeds thereof paid into the treasury of the United States for the purposes aforesaid.

"Sec. 8. *And be it further enacted,* That the several courts aforesaid shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto." * * * * *

The District Court had jurisdiction of the subject matter of the suit. The judgment is not void. The irregularities pointed out may be available on error, but do not sustain the objection to the validity of the judgment in a collateral proceeding.

The third paragraph of the answer is good, and the court erred in sustaining the demurrer thereto. The court also erred in sustaining the motion to strike out the interrogatories filed with the answer.

The judgment is reversed, with costs, and the cause remanded, with directions to overrule the motion to strike out the second, and to overrule the demurrer to the third paragraph of the answer, and also to overrule the motion to strike out the interrogatories filed with the answer, and for further proceedings.

H. Crawford, J. H. Stotsenburg and T. M. Brown, for appellant.

T. L. Smith and M. C. Kerr, for appellee.

Frank and Another v. Kessler and Wife.

FRANK and Another v. KESSLER and Wife.

CONVEYANCE FROM HUSBAND TO WIFE.—Evidence.—A deed of conveyance of real estate from husband to wife, though void in law, may be upheld by a court of equity, whose duty it is, in such case, to inquire into the circumstances under which it was executed; in which inquiry the circumstances of the husband at the time of the conveyance constitute an important element, and evidence of his indebtedness at that time is admissible.

PRACTICE.—*Joinder of Causes of Action.*—A claim to set aside a conveyance of real estate from husband to wife for fraud against creditors, may be joined with a claim against the husband arising out of contract.

SAME.—*New Trial.*—That the finding is too small, in an action upon a contract, is embraced in the fifth statutory cause for a new trial, and must be assigned in the motion therefor, in order to present the question on appeal to this court.

APPEAL from the Putnam Circuit Court.

GREGORY, J.—The appellants sued the appellees, husband and wife, in the court below, to recover a sum due from the husband to them, for goods sold and delivered, and to set aside a conveyance of real estate from the husband to the wife, on the ground that it was fraudulent and void as to creditors. Trial by the court; finding for the plaintiffs for one hundred and thirty-eight dollars as against Henry Kessler. The court further found that the conveyance of Henry Kessler to his wife Catharine, for the land mentioned in the complaint, was not fraudulent or void.

The plaintiffs moved for a new trial on the grounds: 1. That the finding was contrary to the evidence. 2. That the finding was contrary to the law and evidence. 3. That the finding is not supported by the evidence. 4. That the court erred in refusing evidence of indebtedness and insolvency of Henry Kessler, a bill of exceptions of which was filed and made a part of the record. The motion was overruled. The plaintiffs took their bill of exceptions, setting out the evidence and the offer to prove the indebtedness of the husband at the time he made the conveyance to the wife.

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It is claimed by the appellants that the finding against Henry Kessler was too small. By the code, this is made the fifth cause for a new trial, and was not embraced in the plaintiffs' motion therefor. 2 G. & H., p. 212, sec. 352, cl. 5.

The deed from the husband to the wife was void in law, but would be upheld by a court of equity, under certain circumstances. *Fritz v. Fritz*, 23 Ind. 388; *Shepard v. Shepard*, 7 Johns. Ch. 57.

It was the duty of the court below to inquire into the circumstances under which the deed was executed. An important element in this inquiry was the circumstances of the husband at the time of the conveyance. Although at law this conveyance was not in the way of the plaintiffs in making their money on execution, still it was a cloud that they had the right to remove, and is within the provision of the code, that "the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy, and a speedy satisfaction of his judgment." 2 G. & H., p. 99, sec. 72.

The judgment is reversed, as to Catharine Kessler, with costs, and the cause remanded, with directions to grant a new trial, as to Catharine Kessler, and for further proceedings. The judgment, as to Henry Kessler, is affirmed, with costs.

F. T. Brown, for appellants.

J. J. Smiley and W. Neff, for appellees.

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McCord and Another v. COOPER.

CHATTTEL MORTGAGE.—Registry.—The registry of a chattel mortgage, describing the property as "three yoke of oxen," cannot charge with notice a subsequent *bona fide* purchaser from a third person; nor would actual

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knowledge of the contents of the mortgage be sufficient to put such a purchaser on inquiry.

SAME.—*Query*, whether registry has any further effect than that of constructive notice of the contents of the instrument as registered.

APPEAL from the Howard Circuit Court.

FRAZER, J.—This was replevin for four oxen. The answer averred that the only right of possession of the plaintiff to the property arose as follows:—That in February, 1865, one Walters owned the oxen, and then executed a chattel mortgage to the plaintiffs to secure a debt due to them, in which mortgage the oxen in controversy were meant to be included, with other property, and were described, with another pair of oxen, thus: “three yoke of oxen;” which mortgage was duly recorded; that the property remained in the possession and exclusive control of Walters, with the knowledge of the plaintiffs, until eight months after the debt was due, when Walters, for a valuable consideration, sold and delivered said property to two parties, who had no notice that the property was affected by the mortgage. They, for a valuable consideration, sold and delivered the property to another, he to another, and he to another, who, before the commencement of the suit, for value, sold and delivered the property to the defendant; all of said successive purchasers being ignorant that the property was incumbered by the mortgage, though each made diligent inquiry. A demurrer to this answer was overruled, and upon this arises the only question here.

The question presented is, whether the registry of the chattel mortgage, describing the property as stated, was notice to a subsequent *bona fide* purchaser. It is very clear that the mortgage contained no such description of the oxen as would enable any one to identify them; nay, the description given would not even aid in distinguishing them from any other oxen. It was almost as indefinite as it was possible to make it. For all practical purposes, as notice, it would have been quite as well to have used the phrase “six head of cattle.” In either case, any one actu-

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ally seeing the registry would find nothing to inform him that the property in controversy was meant; and if it was in the apparent ownership of a stranger, as was here the fact, he would perceive nothing whatever to arouse any suspicion that these, rather than any other property of the same general class, were intended to be incumbered.

We all agree that actual knowledge of the contents of this mortgage would not have been sufficient to put a purchaser from a third person on inquiry. But the question is as to the effect of the mere registry as constructive notice. That it has the effect of constructive notice of the contents of the instrument as registered, is very plain. Has it any further effect? Does the registry put a purchaser upon inquiry, as where he has actual knowledge of the contents of the instrument? *Frost v. Beekman*, 1 Johns. Ch. 288, and *Jennings' Lessee v. Wood*, 20 Ohio, 261, are instructive cases upon that question. The case before us does not, however, demand any opinion upon that question. If an actual knowledge of the contents of the mortgage would not have been sufficient to charge the defendant with notice, surely the mere registry would not.

The judgment is affirmed, with costs.

C. N. Pollard and D. H. Bennett, for appellants.

J. W. Cooper and B. F. Davis, for appellee.

EARL, Guardian, v. DRESSER, Guardian.

GUARDIAN AND WARD.—*Foreign and Resident Guardians.*—By the common law, letters of guardianship are local to the jurisdiction in which they are granted, and a guardian of the person and estate of a minor cannot, by virtue of his letters granted by a proper court in another state where he and the ward are domiciled, claim as a *legal right* to recover money belonging to the ward in the hands of a guardian of the estate of such

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ward resident in this State. But the Court of Common Pleas, possessing general chancery jurisdiction in such cases, and having jurisdiction of the resident guardian and the funds in his hands belonging to the ward, has power to order that such funds be transmitted or paid over to the guardian in another state where the ward is domiciled.

SAME.—Statute.—Section 107 of chapter 85, Revised Statutes 1843, authorizing the court having jurisdiction to make such order respecting the delivery and payment of property and moneys to the non-resident guardians of non-resident wards as to the court may seem just and right, was but declaratory of what the law was in that respect before its enactment.

SAME.—Judicial Discretion.—The question of the exercise of this power is addressed to the sound judicial discretion of the court, to be determined upon principles of comity, equity and justice; and where it appears for the best interest of the ward, and it does not appear that any principle of public policy will be violated, or the legal rights of any of our citizens injured or impaired, the court should grant the order.

PRACTICE.—Bill of Exceptions.—A memorandum attached to a bill of exceptions, and signed by the adverse party, acknowledging that the bill is correct, and agreeing that it may be signed by the judge as of date of filing, is not a waiver of the question of time. It will be presumed to have been so signed, but where that date is after the time limited by the court, the bill is not properly in the record.

APPEAL from the Tippecanoe Common Pleas.

ELLIOTT, J.—Henry H. Dresser, as guardian of his infant son, Earl H. Dresser, appointed by the probate court of the county of Hillsdale, in the State of Michigan, filed a petition in the Court of Common Pleas of Tippecanoe county, in this State, alleging that Henry Earl had been appointed guardian of the estate of said ward by the last named court, and, as such, had received from the estate of the grandfather of said ward \$5,000 in money belonging to the latter, and praying that said Earl might be compelled to account for the money in his hands, and required to pay the same over to the petitioner, as the guardian of the person and estate of said ward in the State of Michigan, where he and the ward both reside.

A demurrer was filed to the petition, for the want of sufficient facts, which the court overruled, and on the final hearing found that there remained in the hands of said Earl, as such guardian, belonging to said ward, after paying the costs and expenses of his guardianship and the costs of this

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suit, the sum of \$2,419.75, "and that it would be to the interest of said ward to transfer said fund to the control and custody of his guardian in the State of Michigan." An order was thereupon rendered, directing Earl to pay into court the balance so found remaining in his hands, and that the clerk thereupon pay the same over to "said Henry H. Dresser, the guardian of said minor in the State of Michigan." From this order Earl appeals to this court.

Errors are assigned upon the action of the court in overruling the demurrer to the petition, and also in overruling a motion for a new trial. The questions discussed, arising upon the motion for a new trial, were attempted to be saved by a bill of exceptions, which, however, was not filed within the time limited by the court, and, therefore, is not properly in the record. At the close of the proceedings, on the 16th of July, 1867, the court, by special leave, gave the appellant twenty days in which to prepare and present his bill of exceptions. The bill was filed on the 15th of August, 1867. At its close is the following memorandum:

"The foregoing bill of exceptions we have examined and find correct, and may be signed by the judge as of date of filing.

[Signed,] "J. M. DRESSER,
 "J. M. LARUE,
 "Atty's for Plff."

It is not claimed by the appellant that the bill of exceptions was presented to the judge within the twenty days limited by the court, but it is contended that the memorandum copied above is a waiver of the time, and, therefore, that it is properly in the record. We do not so construe the memorandum. If it was intended to waive the question as to the time of filing, and agree that the bill should be considered as a part of the record, that intention might have been clearly expressed in a few words; but the memorandum seems to have been carefully worded to avoid such a conclusion. It acknowledges that the bill is correct, and agrees that it "may be signed by the judge as of the

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date of filing." The presumption is that it was so signed, but the date is after the time limited by the court, and we do not think the language of the agreement can be fairly construed into a waiver of the question of time.

The only question, then, presented by the record, is that arising upon the demurrer to the petition. It is objected to the petition that it treats the right of the appellee to recover the fund as one *stricti juris*, and inherent in him as foreign guardian, where the ward is domiciled, independent of the interest of the ward. Without deciding that the objection, if true, would necessarily render the petition bad on demurrer, it is sufficient to say that we do not regard it as asserting such an absolute right. It is not a complaint in the usual form against Earl as a defendant, nor does it demand judgment against him as in an ordinary adversary suit on a money demand. It is in form a petition addressed to the court, representing that the petitioner is the father and duly appointed guardian of the ward, who is an infant under the age of fourteen years, being one of the heirs at law of Mary A. Dresser, deceased, who was a wife of the petitioner, and one of the legatees of the will of James Earl, deceased, late of Tippecanoe county, Indiana; that the ward resides with his said father, in the county of Hillsdale, in the State of Michigan; that on the 24th of January, 1867, the petitioner was duly appointed guardian of the person and estate of the ward by the probate court of said county of Hillsdale, in Michigan; that he executed a bond in the sum of \$9,500, with sureties to the acceptance and approval of that court, and took upon himself the duties and responsibilities of said guardianship. A copy of his letters and bond are made a part of the petition. The condition of the bond contains this clause: "This bond is given to secure property due said minor in Tippecanoe county, Indiana." The petition further represents that the ward was not the owner of any other personal estate than his interest in the legacy due his deceased mother by the will of James Earl, deceased; that Henry Earl had been ap-

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pointed guardian of the estate of said ward by the Court of Common Pleas of Tippecanoe county, Indiana, and as such had received a large sum, to wit, \$5,000 belonging to said ward on account of the legacy from James Earl to his mother. It alleges a demand of Earl, and a refusal by him to account, and prays that he may be required to render an account of the funds in his hands belonging to the ward, "and that he be ordered to pay the same over to the petitioner as such guardian."

If the Court of Common Pleas had jurisdiction, and possessed the power to make the order requiring the money to be paid over to the guardian appointed in the State of Michigan, where the ward is domiciled, then the demurrer was correctly overruled, and the order of the court is valid. That, by the common law, letters of guardianship are local to the jurisdiction in which they are granted, must be conceded. Speaking on this subject, Justice Story, in his *Conflict of Laws*, says:—"There is no question whatsoever, that, according to the doctrine of common law, the rights of foreign guardians are not admitted over immovable property, situate in other countries. Those rights are deemed to be strictly territorial; and are not recognized as having any influence upon such property in other countries whose systems of jurisprudence embrace different regulations, and require different duties and arrangements. * * The same rule is applied by the common law to movable property, and has been fully recognized both in England and America. No foreign guardian can, *virtute officii*, exercise any rights, or powers, or functions over movable property situate in a foreign state. Few decisions upon the point are to be found in the English or American authorities, probably because the principle has always been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators."

It follows that Dresser cannot, by virtue of his letters of guardianship, granted by the proper court in the State of

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Michigan, where both he and the ward are domiciled, claim to recover the money in the hands of the resident guardian here, as a legal right, because the letters granted in Michigan confer no such extra-territorial power.

But the question is, had the Court of Common Pleas, possessing, as it does, general chancery jurisdiction in such cases, and having jurisdiction over the resident guardian and the funds in his hands belonging to the ward, the power to order the funds transmitted or paid over to the guardian in Michigan, where the ward is domiciled?

The revised statutes of 1843 contained a provision authorizing the court having jurisdiction to make such order respecting the delivery and payment of property and moneys to the non-resident guardians of non-resident wards as to the court may seem just and right. Code of 1843, p. 612, sec. 107. No such provision, however, is found in the revision of 1852, or in any subsequent act; but it is claimed by the appellee's counsel that the provision in the code of 1843 is continued in force by section 802 of the code of 1852. We need not determine that question, as we are clear in the opinion that the same power is possessed by courts of equity under the common law, and the statute of 1843, in that respect, was but declaratory of what the law was before its enactment.

The rule on the subject must necessarily be the same as that relating to executors and administrators of foreign countries, as it is, in both cases, a question of comity. In *Harvey v. Richards*, 1 Mason, 380, where the law on the subject is elaborately discussed, Justice STORY says:—"A court of equity has jurisdiction to decree an account and distribution, according to the *lex domicilii* of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case."

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See, also, note to § 504 *a*, of Story's Conflict of Laws, ed. by Redfield.

The question here is one involving the doctrine of national comity, growing out of the conflict of independent jurisdictions. It is a question addressed to the sound judicial discretion of the court, to be determined upon principles of comity, equity and justice. If it appeared, from the facts of the case, that any principle of public policy would be violated, or that the legal rights of any of our own citizens would be injured or impaired by the transmission of the fund to the foreign guardian, it would undoubtedly be right to retain it here. But it does not appear that any such consequences would result from its transmission. Dresser, the foreign guardian, is the father of the ward. The domicil of the father is the legal domicil of the ward, his infant child, and they are both domiciled in the State of Michigan.

The father is the natural guardian, and, independent of his letters of guardianship—if not morally or otherwise incapacitated—has the right to the custody, care and education of his infant child, and would be quite as likely to consult its interests in the disposition or investment of the fund as a stranger or one more remotely related. Dresser was appointed guardian of the person and estate of the ward by the proper probate court of the county of his domicil, in Michigan, and gave bond, as appears, with special reference to this fund. The bond was approved by the court where it was given, its penalty is ample, and we must presume that the court here, in granting the order, was satisfied of the sufficiency of the sureties.

Under such circumstances, it seems evident that the best interests of the ward, as well as the principles of justice and fair comity, demand that the fund should be paid over to the foreign guardian. The power of the courts of this State to make such orders is clearly recognized in *Warren v. Hofer*, 13 Ind. 167.

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We think the court did not err, either in overruling the demurrer to the petition or in granting the order. The judgment must, therefore, be affirmed.

The judgment is affirmed, with costs.

Z. Baird and J. D. Gongar, for appellant.

J. M. La Rue and J. M. Dresser, for appellee.

30	18
125	330
30	18
141	487

LARRIMORE v. WILLIAMS.

NEW TRIAL.—Surprise.—Motion by plaintiff for a new trial, on the ground of surprise, which ordinary prudence could not have guarded against. In support of the motion, the plaintiff filed his own affidavit, setting forth that certain testimony of the defendant, which plaintiff had not expected, and by which he was surprised, was untrue; that he did not know of any evidence by which to contradict such testimony till after verdict, when he was informed, for the first time, of the true state of the facts and the falsity of such testimony, by a third person, whose affidavit he also filed, which set forth facts, not contradictory of such testimony, but going to avoid it.

Held, that these affidavits did not show such grounds of surprise as entitled the plaintiff to a new trial.

SAME.—Newly Discovered Evidence.—Where the evidence given on the trial is not in the record, this court cannot say there was error in refusing to grant a new trial on the ground of newly discovered evidence, though the affidavits in support of the motion be otherwise sufficient; for it cannot know how far the alleged newly discovered evidence would be merely cumulative.

SAME.—As of Right.—A new trial cannot be claimed without cause shown, under section 601 of the code, in an action to recover damages for obstructing an alleged easement.

APPEAL from the Fayette Circuit Court.

ELLIOTT, J.—Larrimore, the appellant, sued Williams for closing up and obstructing a private way from his land over the land of Williams to a public highway.

The complaint is in two paragraphs. The first alleges that the plaintiff's vendor purchased the private way, being

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seventy-three rods in length, of Williams, in 1833, ever since which time it had been opened and used, as appurtenant to the plaintiff's land, until 1866, when it was obstructed and closed up by Williams.

The second paragraph is the same as the first, except that it claims the right to the way by prescription, by its continued and uninterrupted use, under a claim of right, for more than twenty years.

The complaint concludes with a prayer for judgment for one thousand dollars damages, and that said way be opened, and for general relief.

Answer, the general denial. Trial, and verdict for the defendant. Motion for a new trial overruled, and judgment. The questions in the case arise on the refusal of the court to grant a new trial. Among the causes presented for a new trial are the following:—

“3. Because the plaintiff was surprised and injured by the testimony of the defendant, in a matter which ordinary prudence on the part of the plaintiff could not guard against; in this, that the defendant swore to a contract concerning the opening and closing of the road in controversy, which was untrue, and was never heard of by the plaintiff before said testimony was given.

“4. Newly discovered evidence, material for the plaintiff, and which he could not, with reasonable diligence, have discovered and produced at the trial.”

In support of these causes the appellant filed the affidavits of himself and one Abigail Winborough. It is stated in the appellant's affidavit, that after he had closed his evidence, Williams was sworn, and testified in his own behalf, that he and Allen V. Larrimore, the appellant's father, made a contract by which the way in controversy was to be opened from the land now owned by the appellant, over the land of said Williams, to the Everton road, and that said Allen V. Larrimore was to open and keep open a road running over his own land, past his house, and thence eastwardly over the land then owned by Barak Plummer, to

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Wilson creek; that he, said Williams, afterwards, in 1846, purchased the land of said Plummer, when said Larrimore closed up the last named road running north from Williams' land through the land of Larrimore, thereby violating said contract; that he, Williams, therefore considered that he had the right to close up the way through his own land to the Everton road; that the jury, as he is informed, believing the evidence of Williams, found for him, when in fact there was no such contract, "as the affiant believes," and if there was, that said Allen V. Larrimore did not close up the road or way through his land, as sworn by the defendant, but that the defendant closed up said way on the Plummer land after he became the owner thereof, some five years before said Allen V. Larrimore closed up the way running over his land; that the affiant had not looked for or expected any such evidence as that given by the defendant, and that he was completely surprised thereby, and that he did not then know of any evidence by which he could contradict the same, and did not discover any such evidence until after the return of the verdict; that on his return home he informed some of his friends and members of his father's family what the defendant had testified to on said trial, and was then informed, for the first time, by Abigail Winborough, his sister, of the true state of the facts and of the falsity of the matters testified to by the defendant.

Abigail Winborough swears that after Williams bought the Plummer land, he closed up the road passing through it to Wilson creek, against the will and without the consent of her father, Allen V. Larrimore, and that the latter, some five or six years afterwards, closed up that part of said way passing over his land, because, as the defendant had previously closed it up on the Plummer land, it was no longer of any benefit for through travel; that her father always claimed the road from his farm to the Everton road as a matter of right, and not by the consent alone of Williams, and that she knows of the uninterrupted use thereof, as now located, for upwards of thirty years.

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The motion for a new trial for the causes assigned being overruled, the appellant thereupon moved the court for a new trial under section 601 of the code, as of right, and without cause, upon the payment of all the costs in the case, which he then offered to pay as the court should direct. This motion was also overruled, and the ruling assigned for error.

The ruling of the court upon the motion for a new trial for cause will be first examined. The affidavit of the appellant is intended to sustain the motion for a new trial, on the ground of surprise, on the trial, which ordinary prudence could not have guarded against, and also on account of newly discovered evidence. The ground of surprise stated is, that Williams testified on the trial that it was a part of the contract by which he was to leave the way open through his land from the appellant's land, then owned by Allen V. Larrimore, to the Everton road, that Larrimore was to leave a way open from the south line of his land, passing his house, thence eastwardly to the Plummer land, &c., and that Larrimore subsequently closed up the way through his land, and alleges that no such agreement was ever made. The affidavit, however, of Mrs. Winborough does not sustain the statements of Larrimore. She does not deny, but impliedly admits, that such an agreement was made, but swears that Williams first violated it, by closing up the way on the Plummer land, after he became the owner of it, and thereby destroyed it as a way for through travel, after which Larrimore closed it up on his land. These facts, if material to the case, would not contradict the statements of Williams, but would go to avoid them, which is properly new evidence. It may be remarked, in this connection, that the agreement of Larrimore, as sworn to by Williams, only extended to the way through Larrimore's land. Neither of them, at that time, owned the Plummer land, and had no power, therefore, to control the road way through it. Williams' land lay south of Larrimore's, and when he subsequently purchased the Plummer

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land, the way over Larrimore's land became important to him as a road from one of his tracts to the other.

The affidavits do not show such grounds of surprise as entitles the appellant to a new trial. Nor can we say that the court erred in refusing a new trial on the ground of newly discovered evidence. If the affidavits were otherwise sufficient, which we do not decide, the evidence given on the trial is not in the record, and we cannot, therefore, know how far the alleged newly discovered evidence would be merely cumulative. *Swift v. Wakeman*, 9 Ind. 552; *Townsend v. The State*, 13 Ind. 357; *O'Brian v. The State*, 14 Ind. 469.

The appellant was not entitled to a new trial, as a matter of right and without cause, under section 601 of the code. This is not an action to recover the possession of land, but to recover damages for obstructing an alleged easement.

The judgment is affirmed, with costs.

J. S. Reid, T. B. Adams, and F. Berry, for appellant.

J. C. McIntosh, for appellee.

ARMSTRONG v. COOK.

PROMISSORY NOTE.—Fraudulent Perversion of.—Where a note payable in bank is indorsed upon the representation of the payee that, if it be made and so indorsed, he will have it discounted at a certain bank, with which he falsely pretends to be negotiating for that purpose, and with the proceeds take up a matured note given by the same maker to the same payee, but the payee, instead of having it so discounted, retains it in his own possession, there is a want of consideration to support it against the indorser in the hands of the payee.

SAME.—Co-Surety.—Contribution.—Where a note payable in bank is indorsed with the understanding that the payee will also indorse it for the purpose of having it discounted to raise money for the benefit of the maker, there results between the indorser and payee the relation of co-sureties, with liability to contribution.

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SAME.—*Pleading.—Demand.—Notice.*—In a suit against the indorser of a note payable in bank, the allegations of demand and notice of non-payment must be averments of such facts as constitute proper demand and notice.

APPEAL from the Vanderburgh Common Pleas.

FRAZER, J.—Cook sued Wheeler, Farrar and Jesse Armstrong as makers, and Cyrus Armstrong as indorser of a promissory note. The complaint is in two paragraphs. The first avers, that on the first day of February, 1866, Wheeler, Farrar, and Jesse Armstrong made, and Cyrus Armstrong indorsed, a promissory note, whereby the defendants promised to pay the plaintiff \$2,999.32, at the Evansville National Bank, which remains unpaid, except \$500; that on the 4th day of June, 1866, said defendants, Wheeler, Farrar and Armstrong, got wrongful possession of the note, upon the false pretense that they would give plaintiff a new note for the amount, less \$500 paid thereon, indorsed by Cyrus Armstrong; that on said day plaintiff demanded of said defendants the new note, but they refused it; that he then demanded the old note, but they refused to give it up, declaring that it had been destroyed; that payment of the original note was *duly demanded, at the proper time and place, and payment refused; and Cyrus had notice.*

The second paragraph is substantially like the first. It alleges the making, indorsement, description, maturity, non-payment, fraudulent possession and destruction, as the same are alleged in the first paragraph; alleges that payment of the note was duly demanded on the 4th of June, 1866; that the note remains unpaid, except \$500, which was paid about the 4th of June, 1866, and that Cyrus Armstrong had *due notice of the non-payment of the note.*

All the defendants but Wheeler appeared, and joined in an answer, which, as there is no point made upon it, we may omit, except to say that the sixth paragraph is the general denial.

Cyrus Armstrong answered in three paragraphs. 1.

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General denial. 2. That his indorsement of the note was procured by fraud, in this, that Cook held a note against Wheeler, Farrar, and Jesse Armstrong for \$3,000; that, at maturity, he, to obtain Cyrus Armstrong's indorsement, fraudulently pretended to have parted with the note, but pretended to negotiate with a bank, which he pretended was the holder and owner of the note, a loan to the makers, upon condition that Cyrus Armstrong would indorse the note; that he did indorse the note upon the faith of the truth of these representations, whereas they were false, and made for the fraudulent purpose of procuring the note to be made and indorsed, and which was still the property of Cook, and the bank had no interest therein.

The third paragraph, as finally amended, charges that Cyrus Armstrong was induced to indorse said note by fraud, in this, that before the making and indorsement of the note sued on, Wheeler, Farrar and Jesse Armstrong were indebted to Cook, by note, in the sum of \$3,000; that this note matured about the 1st of February, 1866; that at the maturity of the note, Wheeler, Farrar, and Armstrong applied to Cook for an extension; that Cook refused to renew it, but agreed to try and procure a loan for the amount from the Evansville National Bank; and, for the fraudulent purpose of procuring the signature of Cyrus Armstrong, he falsely and fraudulently pretended that he had procured a loan from the bank, and brought the note sued on to Wheeler, Farrar, and Armstrong at the same time, for the purpose aforesaid, falsely representing that he brought it from the bank, and that upon their signing; and Cyrus Armstrong indorsing it, Cook would also indorse it, and have it discounted in bank, and, with the proceeds, take up the other note; that Jesse Armstrong, who is the son of Cyrus Armstrong, believing these representations to be true, repeated them to Cyrus, who, upon the faith of their truth, and the belief that Cook was to become his co-indorser to the bank, indorsed the note, whereas, in fact and in truth, said bank had no interest in the note, and did

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not loan the money, and the note, when executed, belonged to Cook, and the whole transaction was a mere false pretense to get the name of Cyrus Armstrong on the paper.

The court sustained a demurrer to each of these two special paragraphs.

Assuming at present that the complaint was sufficient, it is difficult to conceive of a plainer proposition in the law than that both the second and third paragraphs of Cyrus Armstrong's answer were good. The facts alleged in each show an utter want of consideration to support the note against him in the hands of the plaintiff, and a fraudulent perversion of it, by the plaintiff, to a purpose never intended by Cyrus. It might be very material to him who should be his creditor in the first instance. He intended it should be the bank; so he contracted, but without his consent it was attempted by the plaintiff to take advantage of the form of the paper and compel him to become the debtor of the latter. Such is the effect of both the paragraphs of the answer. In *Smith v. Knox*, 3 Esp. 46, it was said by Lord ELDON that "if a person gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill, * * then the party taking the bill cannot apply it to a different purpose."

Until the note was negotiated, it created no obligation whatever; and even in the hands of a holder who gave value, but with notice of the facts, it would not have been valid as against the appellant, Cyrus Armstrong. So are all the authorities. *Kasson v. Smith*, 8 Wend. 437; *Denniston v. Bacon*, 10 Johns. 198; *Woodhull v. Holmes*, *id.* 231; *Brown v. Taber*, 5 Wend. 566; Edwards on Bills, 315.

But the third paragraph of the answer goes further still. According to its averments the appellant Cyrus indorsed the paper with the distinct understanding that the plaintiff would also indorse it, for the purpose of having it discounted to raise money for the benefit of the makers. As between the parties this would have created, between Cyrus and the plaintiff, the relation of co-sureties, with the liability of contribu-

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tion if either should be obliged to pay the debt. But the plaintiff seeks to force upon the appellant Cyrus the entire liability of a sole surety. Such a transaction finds no greater approval in the law than it obtains in morals.

But the complaint was not good in either paragraph, and the demurrers should have been applied and sustained to it. The allegations of demand and notice of non-payment are too brief even for the code. Facts, not conclusions of law, must be stated.

The first paragraph fails to show notice to the indorser in proper time to charge him. "Due notice of the non-payment of the note," as in the second paragraph alleged, is not a good averment of notice in apt time. Even the form (2 G. & H. 374), the use of which the statute justifies, by enacting that it shall be sufficient, does not sanction it. What is *due notice* is a question of law. "Cyrus had notice"—the formula of the first paragraph—is, perhaps, more meagre. There the pleader does not even express an opinion as to the legal sufficiency of the notice. It would be a disagreeable duty to reverse a judgment merely on account of defects like these in a complaint, and that necessity need never arise. See *Harbison v. The Bank*, 28 Ind. 133.

The judgment against Cyrus Armstrong is reversed, with directions to proceed according to this opinion.

A. Iglehart and J. M. Shackelford, for appellant.

M. S. Johnson and C. Denby, for appellee.

EHRMAN v. KRAMER.

PARTNERSHIP.—Evidence.—Where the issue was, whether a partnership in a contract for street improvement existed between the plaintiff and defendant, as averred by the defendant, or the plaintiff was simply a surety

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for the defendant upon such contract, and, as such, advanced the money sued for, to enable the defendant to comply with his contract, the court refused to permit the defendant to introduce in evidence a receipt for money paid on account of the work under said contract, part of which was paid by the plaintiff and part by the defendant, at the grocery of the plaintiff, on the day the receipt was dated—the plaintiff, defendant and person to whom the money was paid being present—which receipt was drawn up at the same time by the defendant in the name of both parties, and signed by the person receiving the money, in his own handwriting, in the presence of the plaintiff and defendant.

Held, that the receipt was properly excluded.

PRACTICE.—Assignment of Error.—A motion for a new trial, on the ground that "the verdict is not sustained by the evidence," does not present the question stated in an assignment of error, "that the judgment is for a larger amount than was proved by the evidence of the appellee."

EVIDENCE.—Weight of—The weight to be given to the evidence of witnesses cannot be determined from the record.

APPEAL from the Vanderburgh Circuit Court.

RAY, C. J.—Kramer sued Ehrman upon an account for goods sold, and for money paid; demand, \$2,500. This suit was commenced in April, 1866.

The defendant, Ehrman, answered in three paragraphs. 1. To the effect that in October, 1860, one Tibbitts entered into two separate contracts with the city of Evansville, one for \$3,182.50, the other for \$2,844, to grade, pave and macadamize Main street, in said city, from a certain alley to Eighth street, and that, to secure the performance of said contract, he made two different bonds to the city, with Kramer and Ehrman as his sureties; that said contracts were afterwards assigned to said Ehrman, with the knowledge and consent of Kramer, and also of the city, who accepted and ratified the assignment on the 16th day of November, 1860; that soon after the said contract was made and the work begun by Tibbitts, Kramer and Ehrman, learning that Tibbitts had neither the capital nor the energy to carry on the work, to save themselves from loss, agreed that Ehrman should become nominal contractor for said work, and Kramer surety, and that they together would finish the same with their joint labor and means, and share

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profit and loss equally; that this arrangement was consummated, and bonds to the city were executed in due form, recognizing Ehrman as contractor and Kramer as his surety, Tibbitts having been discharged; that the first contract was nearly completed, and a little work done on the second contract, under this arrangement, and that on the 10th day of April, 1861, the work was, by consent of all parties, assigned to John Haffey, Kramer going security to the city on Haffey's bond; that in pursuance of that agreement between plaintiff and defendant, Ehrman undertook the personal oversight of the work, and that each advanced divers sums of money and other things necessary to carry on the work, and they each received a part of the proceeds of said work; that Kramer received more than his share of money, and that he expended less than his share on the work; that Ehrman expended more than his share and received less than was his due; that besides money, labor, tools, teams, &c., expended on the work, Ehrman spent his time in superintending the same during the winter and until the time of the assignment to Haffey; that the whole of Kramer's demand is composed of the advances made by him as such partner in performing said contracts; that the work having been taken at prices entirely too low, they, Kramer and Ehrman, suffered great loss; that Ehrman advanced, for the joint benefit of said parties, the sum of \$5,285 81, being largely more than his equal share upon said contracts and work; he admits that Kramer furnished a part of the means for the same, and offers to account with Kramer and to set off his claim against Kramer's, and demands judgment for the excess which may be found due him, viz., for \$3,000.

2. General denial.

3. A general plea of payment.

The plaintiff filed a reply in denial of the allegations of the answer. A trial resulted in a finding for the appellee of twelve hundred dollars.

Motion for a new trial, assigning three reasons. 1. That

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the verdict is not sustained by the evidence. 2. It is contrary to law. 3. The refusal of the judge to admit evidence offered by the defendant. Motion overruled, and judgment rendered on the verdict, and exception by the defendant.

There are two bills of exceptions in this record, designated by the clerk No. 1 and No. 2. The first contains an exception to the decision of the judge on the trial, in ruling out a receipt offered in evidence by the defendant. The question raised by appellant upon that ruling will be best shown by copying a portion of the bill of exceptions, as follows:—

“The plaintiff, having been sworn as a witness, swore to the payment of eighty dollars to one John Haffey, on account of the work specified in the pleadings, and the defendant being afterwards sworn as a witness, on being interrogated in reference to the payment of said sum of eighty dollars by the plaintiff, testified that the plaintiff had so paid the sum of eighty dollars, and that he, the defendant, at the same time, paid the said Haffey the sum of one hundred dollars on the same account. The defendant, at the same time, produced a receipt in writing, of which the following is a copy:

“\$180.00. EVANSVILLE, January 12th, 1861.

“Received of E. J. Ehrman and Philip Kramer one hundred and eighty dollars, on account for rock.

“JOHN HAFFEY.”

“And the defendant then further testified that the said payment was made at the grocery of the plaintiff, in Evansville, on the day the receipt is dated; that at the time of the said payment, the three—plaintiff, defendant and Haffey—were all present, and that at the same time defendant drew up the receipt and the said Haffey signed it, in presence of the plaintiff and defendant, and that the signature was in the handwriting of said Haffey. The defendant, by counsel, then offered the receipt in evidence in behalf of the defendant, and proposed to read the same to the jury,

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to which the plaintiff, by counsel, objected, and the court sustained the objection and refused to permit defendant to read the same, to which opinion of the court the defendant excepted at the time," &c.

Appellant assigns for error:—1. That the judgment is for a larger amount than was proved by the evidence of appellee. 2. The ruling out the receipt offered in evidence by appellant. 3. The refusal by the Circuit Court to grant appellant a new trial. 4. That the verdict is not sustained by the evidence.

It will be observed that the motion for a new trial does not present the question which the appellant has stated in his first assignment of error. *Spurrier v. Briggs*, 17 Ind. 529.

The issue between the parties was, whether a partnership existed between them, or whether Kramer was simply a surety, and, as such, advancing money to enable Ehrman to comply with his contract. The receipt offered in evidence could not, in any way, aid the jury to determine this issue. But the evidence offered does not show that Kramer had any knowledge of the contents of the receipt. It was not taken by him, nor does it appear that it was ever in his possession. His presence in the room certainly does not charge him with knowledge of the contents of the receipt.

We cannot disturb the finding on the ground that the verdict is not sustained by the evidence. We have no hesitation in saying that, as the evidence appears in the record, the weight is in favor of the appellant, and if the witnesses had seemed of equal credit, there should have been no reluctance in granting a new trial. But we cannot, from the record, determine the weight to be given to the evidence of the witnesses. That responsibility rests with the judge who tries the case, and it is his duty to exercise far more freedom in regard to the verdict of the jury than we can do, looking only to the written testimony.

The judgment is affirmed, with costs.

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ON PETITION FOR A REHEARING.

GREGORY, J.—There has been an earnest petition for rehearing filed in this case that seems to require more than a silent notice.

The question is fully stated in the opinion pronounced by Judge RAY. The only complaint that can be made, with any degree of plausibility, is to the conclusions drawn from the facts, which are fairly stated. The receipt was offered in evidence against Kramer. The question in dispute was, whether Kramer advanced money as the surety of Ehrman, or as partner. Eighty dollars included in the receipt was paid by Kramer, and one hundred dollars, the residue, was paid by Ehrman. The fact that a joint receipt was taken for the aggregate of the two sums would, of itself, be a circumstance tending very slightly to prove the fact in dispute, even had the receipt been taken by Kramer himself. But it could only be admitted against him on the ground that it was an act of his, or to which he was privy, amounting to a verbal admission by him. Was it such an act? The receipt was written by Ehrman. The mere presence of Kramer is the only thing to connect him in any way with it. It was taken and kept by Ehrman, and by him produced on the trial. If evidence at all, it was evidence manufactured by himself. To make Kramer privy to the form of the receipt—and that is the only thing that had any bearing—it seems to us that something more than his presence was necessary. There must have been proof of some circumstance tending to show actual knowledge of its contents. In the language of Mr. STARKIE, “in general, it would be contrary to the first and most obvious principles of justice, that any one should be bound by the acts, or concluded by the declarations or assertions of others to which he was nowise privy.” 1 Starkie on Ev. 51.

The petition for rehearing is overruled.

A. L. Robinson and C. Denby, for appellant.

A. Iglehart and J. J. Chandler, for appellee.

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COLLIER and Others v. COLLIER and Others.

RESULTING TRUST.—Evidence.—Parol evidence to establish a resulting trust in land held by an absolute conveyance, after a long lapse of time and the death of the nominal purchaser, must be strong and clearly relevant.

APPEAL from the Bartholomew Circuit Court.

GREGORY, J.—Suit by the appellees against the appellants. The complaint charges, “that on the 9th day of March, 1833, Daniel Coleman was the father of Elizabeth Collier, who was the wife of Stewart Collier, late of said county, deceased. On said date, said Daniel Coleman made his last will and testament, and by the terms of said will he loaned one equal share of his estate, after it was converted into money, to said Elizabeth Collier, during her life, and at her death he gave it to the children of said Elizabeth Collier. Said testator died in 1835, without in any way revoking said will, and the same was, at his death, in full force, and, as such will, it was duly admitted to probate in the county court of Gallatin county, Kentucky. A copy of said will is filed with the complaint and made part thereof. By virtue of the provisions of said will, said Elizabeth Collier received, by way of loan from said testator, some seven hundred dollars, which fund belonged to her children, which she might leave at her death. To better carry out the intention of said testator, when said money came to the hands of said Elizabeth Collier, it was agreed by parol between her and her husband, Stewart Collier, that he should take said money, or any portion thereof, and enter land therewith, and hold the same in trust for the use and benefit of the children of said Elizabeth Collier. In pursuance of said will and said agreement between said Elizabeth and Stewart Collier, she put said legacy in the hands of her said husband to carry out said bequest and agreement for the benefit of her said children, and in pursuance thereof said Stewart Collier, with some three hundred dollars of said money for the benefit of said children, entered

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the following described land in Bartholomew county, in the State of Indiana to wit:—

“The southeast quarter and the east half of the southwest quarter of section twenty-nine, township nine, north, in range seven, east, containing two hundred and forty acres, more or less.

“The patents for said land were issued in the name of said Stewart Collier. Said Elizabeth and Stewart Collier took possession of said land, improved and cultivated the same, said Stewart Collier getting and taking the income therefrom to his own use, until about the 2d day of January, 1863, when the said Elizabeth Collier departed this life, leaving her said husband still in the possession of said land. The east half of the southwest quarter aforesaid was sold by said Stewart, after the death of said Elizabeth, to Logan C. Collier. Said Elizabeth Collier left, as her only children, the plaintiffs, except those mentioned as the husbands of some of the plaintiffs.

“After the death of his said first wife, Elizabeth Collier, said Stewart Collier intermarried with the defendant, Mary A. Collier, and by her had the other two defendants, Richard Collier and Stewart Collier, who are both infants under twenty-one years. Said Stewart Collier, Sen., died intestate, and left as his heirs the plaintiffs and defendants, except as above. Said plaintiffs had no knowledge whatever of the existence of said will, or the contents thereof, or said agreement, until after the death of said Stewart Collier, Sen. Said Collier died with the ostensible title to said land in him, and said widow and said other defendants claim an interest in said land as heirs at law of said Stewart Collier.”

The following is all of the will having any bearing on this case:—

“Item 4. It is my will that all my just debts be paid; that the money arising from the sale of my estate be divided in the following manner, viz:—In the first place I wish

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all my children to be made equal, except the fifty dollars extra to my son William, and *after they are made equal in property or money, I divide the balance as follows:— * * ** I lend to my daughter, Elizabeth Collier, one equal part of my estate, and at her death I give that I have lent her to her children."

Mary A. Collier answered by the general denial, and two other paragraphs to which the court sustained demurrers. The cause was tried by the court, the following being the substance of the evidence:—Patents for the land in question, from the United States to Stewart Collier, reciting that,

"Whereas, The said Stewart Collier has deposited in the general land office a certificate of the register of the land office at Jeffersonville, whereby it appears that full payment has been made by said Stewart Collier for, &c., the United States do give and grant unto the said Stewart Collier and his heirs" the land described in the complaint.

The patents all bear date September 25th, 1835. The defendants objected to the admission of these patents, but the objection was overruled, and defendants excepted.

Plaintiffs then introduced Logan C. Collier, and offered to prove by him parol declarations made by Stewart Collier and Elizabeth Collier, in his presence, to establish the trust in said real estate, and defendants at the time objected for the reasons:—1. That such evidence was irrelevant and immaterial to the issues in said causc. 2. That it was not proper to establish a trust, after the death of the trustee, by parol declarations made by the alleged trustee before his death. 3. That parol evidence was not admissible to vary, alter or contradict the terms of an absolute conveyance.

This objection was overruled, and the defendants excepted. Said Logan C. Collier then testified in substance as follows:

"Am one of the plaintiffs. Patents cover land on which Stewart Collier lived and died. Heard conversation between my father and mother as to where money with which land was entered came from. They said the money

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came from my mother's father, and was used to enter this land. * * * Heard conversation at William E. Herod's. My parents and William Coleman were present. Mother said to William Coleman, if she should see one of his slaves running away, she would give him a piece of bread and tell him to go on. Coleman said he did not see that it was much better to sell slaves and live on the money than to keep them in bondage. Father was present. Mother had owned a slave in Kentucky, which she sold before she came to Indiana. Have heard my father and mother speak of her money buying land; she would tantalize him about it."

Plaintiffs offered Jacob Davis as a witness to prove certain parol statements made by Stewart Collier, to establish said trust, and defendants objected for the following reasons:—

1. That such evidence was irrelevant and immaterial to the issue in said cause. 2. That it was not proper to establish a trust, after the death of the trustee, by parol declarations made by the trustee before his death. 3. That parol evidence was not admissible to vary, alter or contradict the terms of an absolute conveyance.

The objection was overruled, and defendants at the time excepted. Jacob Davis then testified in substance as follows:—

"Knew Stewart Collier; saw him five or six years ago; had conversation with him about this matter; it was in 1861; were walking on his farm; asked him how he got his start here; said his start here was through some money he got through his wife from her father's estate—about \$400; said he entered his land before he moved to this State; think he said he got the money to buy it through his wife."

The will of Daniel Coleman was then offered in evidence and objected to. The objection was overruled, and exception taken.

The tract book of Bartholomew county, showing that

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the land in question was entered December 3d, 1834, was read in evidence.

The depositions of Lewis Coleman, Dabney Coleman and William L. Coleman were read in evidence. Dabney Coleman testified that Collier came to Indiana in 1834 or 1835. William L. Coleman testified that it was in 1835 or 1836. Said William L. Coleman also testified as follows:—

Answer to Question 6.—“I heard Elizabeth Collier say that they had taken her money out there and entered the land upon which they were living. She asked me if I did not think they had done better for the children by investing the money in land out there than they could have done in Kentucky. This was two or three years after they removed to Indiana. Stewart Collier was present.”

Answer to Question 9.—“Five or six years after this conversation I was at Collier’s house in Indiana; Stewart Collier was present. A conversation came up in regard to slaves. Elizabeth sat down by me and said, if she should see one of my negroes running off, she would give him a piece of bread and tell him to clear himself. I then asked her how much better she had done, that she had taken her interest her father’s negroes sold for, and purchased that land they were living upon, and raised her children on the proceeds to help steal my negroes. Stewart Collier then spoke up and said, ‘That is the fact, Betsy; what William has told you is true.’ He said he was sorry she had said anything about it.”

At the proper time before the trial, the defendants moved to suppress the depositions of said Lewis Coleman, Dabney Coleman, and William L. Coleman, and also various questions and answers in the deposition of each. These motions were overruled, and the defendants excepted.

This motion was made as to the answers to the sixth and ninth questions in said William L. Coleman’s deposition, for the reasons that said answers were irrelevant and immaterial to the issues in said cause, seek to vary a written in-

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strument by parol evidence, and are evidence of parol declarations to bind said Stewart Collier after his death; and was overruled and excepted to as to each of said answers.

The court below found for the plaintiffs, whereupon the defendants moved for a new trial. One of the grounds for the new trial was, that the finding was contrary to the evidence.

Here was an attempt to establish by parol evidence, a trust in land held by an absolute conveyance by the deceased, Stewart Collier, for more than thirty years.

We think the evidence does not sustain the finding. There is no proof that Elizabeth Collier received any money under the clause of the will by which the testator gave her one equal part of his estate during her life, and at her death to her children. She may have received the four or five hundred dollars spoken of by the witnesses under the clause equalizing the children of the testator.

The entire testimony as to the trust consists of declarations of Elizabeth Collier and her husband, Stewart Collier, in loose conversations, in which nothing was said about any agreement or understanding between the latter and the former that the latter should invest the money in land, to be held by him in trust for the children of the former. It would be a dangerous innovation of the rules governing this class of cases to allow this finding to stand.

The court erred in overruling the motion for a new trial.

The judgment is reversed, and the cause remanded, with directions to grant a new trial, and for further proceedings.

F. T. Hord, S. Stansifer, and F. Winter, for appellants.

Peterson v. Hutchinson.

PETERSON v. HUTCHINSON.

NEW TRIAL.—Evidence.—In a suit for slander, in which there had been a change of venue, the plaintiff was permitted, over the objection of the defendant, to prove that the latter had said to the witness that “he wanted to bring the case here on a change of venue, because he wanted H. (the plaintiff) to have some trouble as well as him all.”

Held, that this was an error of law, for which the defendant was entitled to a new trial.

APPEAL from the Cass Circuit Court.

GREGORY, J.—Suit by appellee against appellant for slander. The words charged are: “He stole my hogs;” “he marked my hogs;” “he penned my hogs.”

The defendant answered in three paragraphs. 1. General denial. 2. Statute of limitations. 3. That the plaintiff had marked and penned defendant’s hogs, whereby the former was induced to believe that the latter intended to commit a larceny.

The plaintiff replied to the second and third paragraphs by the general denial.

Trial by jury; verdict for the plaintiff for five hundred dollars. Motion for a new trial overruled. The evidence is made a part of the record by a bill of exceptions.

The plaintiff, on the trial, was permitted to prove, over the objection of the defendant, that the latter told the witness “he wanted to bring the case here on a change of venue, because he wanted Hutchinson to have some trouble as well as him all.”

The case was commenced in the Carroll Circuit Court, and before the time of this conversation it was taken, by change of venue, to the Cass Circuit Court. The conversation was had in Cass county.

This ruling of the court was error. The law secured to the defendant the right to a change of venue. Nothing that was said about that change could have the effect of increasing the damages; nor could it in any way show with

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what mind the words charged were spoken. This was one of the grounds of the motion for a new trial. There are several other grounds for a new trial, but they become unimportant in view of the fact that the defendant is entitled to such new trial, and may not arise on a second trial. The question of variance can be obviated by an amendment of the complaint. The surprise set up as a cause for a new trial will not probably occur on another trial.

The only question before us is, did the court below err in overruling the defendant's motion for a new trial?

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial, and for further proceedings.

D. P. Baldwin, for appellant.

L. Chamberlain and J. C Applegate, for appellee.

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WILL.—Contingent Remainder.—Executor Devise.—Devised to trustees in trust for C. and his family during his life, and, if his wife should survive him, for his wife and his children surviving him, during her widowhood; upon the death of C. and his wife, or his death and the marriage of his widow, thereupon, instantly, and thenceforth the real estate devised to descend, go to, and become the absolute property of the children of C. living at the happening of such contingency, and such others of his children as might thereafter be born, if any, and the children of any deceased child of his; if any child of C., "now in existence, or hereafter born," should die a minor and without heirs of his or her body begotten, or die after majority, intestate and without such heirs, the estate or interest of such child to go to, vest in, and become the property of his or her brothers and sisters and their descendants, and for want of such brothers or sisters, or their descendants, such estate or interest to go to, vest in, and become the property of the cousins of such deceased child, children of J., and their descendants.

30	39
134	425
30	39
148	272

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Held, that the children of C. took a contingent remainder, and that the limitation to the cousins was void under the rule against perpetuities.

SAME.—*Remainders.—Intention of Testator.*—In cases of doubtful construction, the law leans towards vested remainders, but the intention of a testator, where it can be ascertained, governs, whether it result in vested or contingent remainders.

SAME.—*Perpetuities.—Rule Against.*—If, by any possibility, the vesting in possession of an estate limited over by way of executory devise may be postponed beyond the period of a life or lives in being and twenty-one years and nine months, the limitation is void; and the rule runs from the death of the testator.

SAME.—*Statute.*—The proviso in the eleventh section of the act regulating descents, distribution and dower, of February 17th, 1888, did not change the rule against perpetuities.

VENDOR AND PURCHASER.—Consideration.—Covenant.—A. and B. sold, and, by deed with full covenants, conveyed, to C. certain real estate, A. having only a life estate therein, and B. only one undivided half in fee, subject to such life estate.

Held, in a suit against C., in possession under the deed, on his note given for a part of the purchase money, that this partial want of title in the vendors was no failure of the consideration of the note, or breach of the covenants in the deed entitling C. to recover back any part of the purchase money.

APPEAL from the Vanderburgh Circuit Court.

GREGORY, J.—The administratrix of Dewitt C. Evans sued Silas and Henry C. Stephens on a promissory note. The defendants answered in two paragraphs, setting up substantially the same facts. Demurrers were sustained to the answer, and this presents the questions involved.

The consideration of the note was the sale and conveyance of a tract of land in fee by deed with full covenants, from Saleta Evans and Dewitt C. Evans to Henry C. Stephens.

Robert M. Evans, at the time of his death, in February, 1848, was the owner in fee of the land. Saleta Evans is the widow, and Dewitt C. Evans was the son of Camilas Evans, a son of Robert M. Evans. Henry C. Stephens is a son of Juliana Stephens, a daughter of Robert M. Evans. The title to the land depends upon the construction and effect to be given to four articles of the will of Robert M. Evans, numbered second, third, fourth, and twelfth. The

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land in question is embraced in the third. These articles are as follows:—

Second. “Having heretofore conveyed to my daughter, Juliana Stephens, lot number five, in the original plan of the town of Evansville aforesaid, on which she, with her husband and family, and myself now reside, to have, possess and enjoy the same during her natural life, and remainder to her children in fee, after her death; as an equivalent therefor, I do give and devise to my trusty friends, Silas Stephens, John Shanklin, and Marcus Sherwood, all of the town of Evansville aforesaid, in trust, to and for the uses and purposes hereinafter declared and specified, all that block or piece of ground lying within the bounds of the town of Evansville aforesaid, containing something more than two acres, and bounded on the northwest side by Main street, as extended in and through the eastern enlargement of said town; on the northeast side by Sixth street; on the southeast by Locust street, and on the southwest by Fifth street and the canal, being the same premises known as my old homestead, on which my son Camilas now resides.

“To have and to hold the said block of ground, with its appurtenances, unto the said Silas Stephens, John Shanklin and Marcus Sherwood, and the survivor and survivors of them, and the successor and successors of them, or any or either of them, in trust, to and for the uses and purposes following, that is to say: that the said Stephens, Shanklin and Sherwood, and the survivor or survivors of them, or of any or either of them, and their successors as my trustees (whom I shall henceforth style my trustees), shall, in their discretion, either permit my son Camilas C. Evans and his family, during his life, to reside upon, possess and enjoy the said block of ground in this article described as tenant thereof, from month to month, (but without the payment of rent) or pay to the said Camilas, quarter-yearly, at the expiration of each quarter, for the use of himself and his family, the rents and profits of the

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said block of ground, accrued for the quarter year next preceding such payment; and that in the event of the death of my said son, leaving his wife to survive him, then, during her widowhood, she and her family shall be permitted to reside on the said premises as tenants thereof as aforesaid, or receive the rents and profits thereof as aforesaid."

Third. "I give and devise to my said trustees the following described pieces or tracts of land lying in the county of Vanderburgh, in the State of Indiana, in township number six, south of range number ten, west, in the district of lands subject to sale at the land office at Vincennes, that is to say: the northeast quarter of section number fifteen, and the southern half of that part of the northwest quarter of section number fifteen, which lies north of Pigeon creek, and is commonly called the Vaun farm, lying south of the fence which divides it from what is commonly called the Robinson farm, situated on the northern half of the last mentioned quarter section; also, that part of the west half of the southwest quarter of said section fifteen which lies north of Pigeon creek and adjoining the said farm, being the same fraction I purchased of David Negley; also, that part of the east half of the southwest quarter of section fifteen which lies north of Pigeon creek, and adjoining the same Vaun farm, and also that part of the west half of the southeast quarter of said section fifteen lying on the north side of Pigeon creek, and also one undivided half or moiety of all the residue of my real estate not by this will devised to some other person or otherwise disposed of. To have and to hold the land and premises in and by this article of this will described and devised unto my said trustees, and the survivor or survivors of them, and their successors as such trustees, in trust, to and for the uses and purposes hereinafter declared and specified, that is to say: in trust and confidence that my said trustees, and the survivor or survivors of them, and their successors as such trustees, shall and will receive rents, issues and profits

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of the land and premises in and by this third article of this my will described and devised, and appropriate and dispose of the same for the benefit of my son Camilas and his family during his life, and after his death, if his wife survive him, during her widowhood, for the benefit of his said wife and his children surviving him, subject, however, to the provisions of the fourth article of this will. And in appropriating and disposing of the last mentioned rents, issues, and profits, my said trustees shall have special regard for, and reference to, frugality and economy, and the proper education and sustenance of the children of my said son Camilas."

Fourth. "It is my will that upon the death of my said son Camilas and his wife, or upon his death and the intermarriage of his widow with another man, thereupon, instantly, and thenceforth, the said block of ground, or homestead, described in, and devised by, the second article of this will, and also the several parts of the aforesaid section (of land) No. fifteen, described in, and devised by, the third article of this will, together with the rents, issues, and profits thereof, shall descend, go to, and become the absolute property of, the children of my said son, living at the happening of such contingency, and such others of his children as may thereafter be born (if any), and the children of any deceased child of his, in equal proportions, as tenants in common, in fee simple, that is to say: the children of any such deceased child, shall have the share to which their parent, if living, would be entitled according to the provisions of this will; provided, that the share of each and every of such children, whilst he or she shall be a minor, shall be and remain subject to the control and management of my said trustees, according to the provisions of the third article of this will; and, as to the residue of my real estate devised to my said trustees by the third article of this will, it is my will that the children of said son Camilas, now living, and such other children as may be hereafter born (if any), shall have, possess and enjoy the same as tenants in

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fee simple, upon attaining the age of twenty-one years. And upon attaining that age, each and every such child shall have, possess, and enjoy his or her share, uncontrolled by my said trustees, notwithstanding the minority of any one or more of his or her brothers or sisters, nephews or nieces; and in like manner after the death of my said son and his wife, or after his death and subsequent marriage of his widow, it is my will that the said block of ground, or "homestead," and those parts of said section No. fifteen mentioned in, and devised by, the third article of this will, shall be held, possessed, and enjoyed by the children of my said son, now living, and such other child or children of his as may hereafter be born (if any), upon their respectively attaining the age of twenty-one years, uncontrolled by my said trustees. * * * * *

Twelfth. "It is my will that if any one or more of the children of my said son Camilas, or of my said daughter Juliana, now in existence, or that may be hereafter born, should die a minor and without heirs of his or her body begotten, or die after attaining the age of twenty-one years, intestate, and without heirs of his or her body begotten, then and in every such case, the estate or interest by this will given in any part of my estate to any such child so dying, shall go to, vest in, and become the property of, his or her brothers and sisters and their descendants, in equal proportions, the descendants of a deceased brother or sister taking the estate or interest to which their deceased parent would have been entitled if living. And for the want of such brothers or sisters or their descendants, such estate or interest shall go to, vest in, and become the property of, the cousins of such deceased child and their descendants (such cousins being the children of my said son, or of my said daughter, as the case may be), the descendants of any deceased cousin taking the share or interest to which their deceased parent would have been entitled if living."

It is averred in the answer, that at the death of the tes-

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tator, he left him surviving, his son, Camilas C., and Saleta, the wife of the latter, and their four children, Paul Jones, Dewitt C., Robert Morgan, and Harrison Clay; and also Silas and Juliana Stephens and their four children named in the will; that shortly after the death of the testator, Harrison Clay Evans and Joshua Wing Stephens (son of Silas and Juliana) died, intestate, without issue; that afterwards, in 1843, another son was born to Camilas C. and Saleta, whose name was Berry B.; that afterwards, in 1844, Camilas C. died, intestate, leaving his wife surviving him, and leaving also surviving him his only children and heirs, Paul Jones, Dewitt C., Robert Morgan, and Berry B.; that afterwards, in 1845, Juliana Stephens died, leaving her husband, Silas, surviving her, and leaving also surviving her, her three children, Jane, Robert, and Henry, and leaving no other child or children of her body, and no descendant of any such child or children; that afterwards, in 1858, Paul Jones, Robert Morgan, and Berry B. Evans all died, intestate, neither leaving surviving him any child or children of his body begotten, or any descendant of any such child or children, Dewitt C. being at the time of the death of Paul, Robert, and Berry, the sole surviving child and heir of Camilas C. Evans; that afterwards, Robert Evans Stephens died, intestate, leaving his wife, Mary M., and his three children, Ella, Edgar, and Jane, as his only children and as his only descendants and heirs; that afterwards, in February, 1866, Dewitt C., after having attained the age of more than twenty-one years, departed this life, intestate, without ever having been married, and leaving no child or children of his body begotten, and no descendant of any such child or children surviving him, but leaving his mother, Saleta, surviving him as his sole heir at law; that Paul Jones and Robert M. (sons of Camilas) had each attained the age of twenty-one years before the times of their deaths, respectively, but that Berry B. Evans, at the time of his death, was not more than fifteen years of age; that Saleta and Dewitt C. Evans had not, nor had either

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of them, any title to the land so conveyed by them to Henry C. Stephens, except such as they derived through said will; that if Saleta had such an interest as could pass by the deed, it was only the right to receive the rents and profits of the land during her natural life, which, as compared with the fee, was not and is not worth more than one-fifth part in value of the entire consideration, or of the \$2,049 mentioned in the deed; that by reason of the facts averred, the title to the land attempted to be conveyed by the deed has wholly failed, unless it shall be held that it was competent for Saleta to convey the right to receive the rents and profits thereof during her life or widowhood, she being still a widow, and aged about fifty-eight years, and the rents and profits of the land since the making of the deed being of the value of one hundred dollars; that Henry C. Stephens has, during the same time, made lasting and valuable improvements on the land to the amount and value of two hundred dollars; that Henry C. Stephens, at the time of the purchase of the land, was ignorant of the purport, provisions, and contents of the will; that Saleta Evans and Dewitt C. Evans, at the time of making the deed, represented to Henry C. Stephens that they owned the land in fee absolute, and he, relying upon their representations, accepted the deed and executed the note sued on.

The first question presented is, did the children of Camillas Evans under the will take a vested or contingent remainder in the land conveyed? A contingent remainder is defined to be "an interest in remainder, limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event."

This question must have its solution by a reference to the language of the fourth article of the will. By the express language of that article the land was to "descend, go to, and become the absolute property of, the children" of Camillas, *living at the happening of the contingency*. The limitation was, then, to take effect "to a dubious and uncertain person."

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In *Olney v. Hull*, 21 Pick. 311, the will contained the following clauses: "I give to my dear and loving wife, as long as she remains my widow, the improvement of all my lands and buildings." "Should my wife marry or die, the land then shall be equally divided among my surviving sons, with each son paying sixty dollars to my daughters, to be equally divided among them, as soon as each son may come in possession of said land."

Under this will it was held, that the sons surviving the contingency, and not those surviving the testator, were meant, and that, therefore, they took a contingent, and not a vested remainder. MORTON, J., in speaking for the court, says, "On the whole, we are clearly of opinion, that the fair, and only fair construction of the language in the will, gives the estate to such sons as shall survive the mother; that until her death it was uncertain who would be alive to take, and therefore, that no estate vested in any one before that event happened."

In the case under consideration, the language of the will is equally clear, that the children of Camilas, living at the happening of the contingency, and such others of his children as might thereafter be born, and the children of any deceased child of his, were to take the land in question. It is true that the law has no partiality for contingent remainders, but in all cases of doubtful construction leans toward vested remainders. But it is equally true that the intention of the testator is always to be the polar star to guide our inquiries. Whenever the meaning can be ascertained, it must govern, whether it result in contingent or vested remainders.

There is a class of cases that at first blush seem to be in conflict with the case of *Olney v. Hull*, *supra*, but we think that a careful examination of these cases will result in the conclusion that there is no conflict whatever. *Womrath v. McCormick*, 51 Penn. St. 504, is mainly relied on to establish a contrary result. The will in that case provided:—"I give

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and bequeath to my said dear wife the net rents, income and interest of all my estate, real and personal, during all the term of her natural life, for her own use. But it is my desire that the surplus income of my said real and personal estate that shall remain from time to time, after the appropriation of whatsoever part thereof she may require or expend for her own use, shall be divided by her among our children, share and share alike. It is my will that upon the decease of my said dear wife, all my real and personal estate (with the exception of the homestead place aforesaid, in Frankford, whereon I now reside) shall be valued and divided into as many parts, to be equal in value as near as may be, as I shall then have children living, the issue of any deceased child to represent their respective parent or parents; and each of such issue, if any, to be considered in the division as one part only; which valuation shall be made by three competent and disinterested persons, who shall be nominated and appointed by the surviving executors of this my will, hereinafter named, and the shares so divided shall be drawn for in the manner the persons making such division shall direct, so as to designate a particular share or part of my estate for each child, and for the issue of any deceased child to whom the same shall fall, upon each drawing. And I give, devise and bequeath to each of my said surviving children, and the issue of any deceased children, such issue to stand respectively in the place of their parent, and to take together only the share their respective parent, if living, would have taken, one equal share or part of all my said estate, real and personal, divided, allotted and drawn for as aforesaid, to have and to hold their said respective shares to them respectively, and their respective heirs, executors, administrators and assigns forever. It is my will that the place in Frankford on which I now reside, containing about nine acres, hereinbefore devised to my dear wife during her natural life, shall not (in the event of her decease prior to that time) be divided before

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the year of our Lord 1870, but shall, if my said dear wife die before then, be leased in the mean time by my surviving executors from year to year, for the benefit of my estate, after which time (my said dear wife being deceased) it may be divided among my children then living, and the issue of such of them as shall be deceased, unto whom I devise the same in the shares and in the way and manner hereinbefore mentioned in regard to my other estate, devised to and ordered to be divided among them." THOMPSON, J., in speaking for the court, says: "Here the life or particular estate in the widow must certainly determine at no very remote period, and by no possibility could the remainders determine during the continuance of that estate, for they were to the several children, their heirs and assigns or issue, interchangeably, and each constituted a single unconditional estate in remainder. The devisees were all *in esse* and ascertained, and were the children of the devisor. It seems to us that there was nothing contingent in the interest devised, but only as to the time of enjoyment, and that would have no effect upon the character of the estate."

But in the case at bar, the devisees were not all *in esse*. It was the vesting of the estate, and not the division of the property, which was referred to, and embraced in, the words "thereupon, instantly, and thenceforth," used in the fourth article of the will.

In *Sturges v. Pearson*, 4 Madd. 411, the testator gave by his will one-fifth of certain personal property, in the following words: "I give the interest and dividends of one other fifth part thereof to be paid to my daughter Anne Tatnall, during her natural life; and after her decease, I give the same to be equally divided amongst her three children, or such of them as shall be living at her decease, the same to be paid to them at their age of twenty-one years." The VICE CHANCELLOR says: "If the will had stopped with the bequest of the interest and dividends to A. Tatnall for her life, and after her decease to be equally divided amongst

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her three children, it is clear the children would have taken vested interests; but the testator adds these words, ‘or such of them as shall be living at her decease;’ and upon this expression the difficulty arises. If I were to indulge conjecture, I might think the testator did not intend that the children should take unless they survived their mother; but where the expressions used are capable of a sensible effect, it is not safe to depart from them. The vested interests first given by the will, are, by the form of the expression, only defeated in case there shall be some or one, and not all of the children living at the mother’s death; but that event did not happen, for there was not one child living at the mother’s death. The alternative branch of the sentence, therefore, fails, and the primary expression, which gave vested interests to the children, takes effect.” This decision clearly explains a sentence of a text writer (Powell on Devises) which seems to be against the conclusion to which we have arrived.

In *Danforth v. Talbot's Adm'r*, 7 B. Mon. 623, the devisee was *in esse*; and the limitation was not to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event.

In *Moore v. Lyons*, 25 Wend. 119, the persons to take the remainder were *in esse* and ascertained by the will. *Vanderheyden v. Crandall*, 2 Denio, 9, and *Forsyth v. Rathbone*, 34 Barb. S. C. 388, cited by counsel, do not militate against the conclusion to which we have arrived.

Since the briefs were filed in this case, our attention has been called to the cases of *Foster v. Wick's Lessee*, 17 Ohio, 250; *Hempstead v. Dickson*, 20 Ill. 193; and *Yeaton v. Roberts*, 8 Foster (N. II.), 459. We have given them a careful examination. The latter of them only, seems to require comment. In that case it was held, that upon a devise of real and personal property to one for life, “then to go and descend to the children of A. and the children of B., and such other children as they may hereafter have, in equal shares, in fee,” the children of A. and B. living at the death of the

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testator, took a vested remainder, subject to open and admit after-born children to a participation; and that the share of one of these children who died, passed, according to its quality, to the administrator and heir of such child. The distinction, however, between that case and the one at bar is this: in the former case all the children of A. and B. were to take, in the latter only the children of Camilas who survived the happening of the contingency, and such others of his children as might thereafter be born (if any), and the children of any deceased child of his.

The next inquiry is as to the validity of the limitation to the cousins in the twelfth article. The rule is, that a limitation over by way of executory devise, in order to be valid, must be so made that the estate not only may, but must vest in possession within a life or lives in being and twenty-one years and nine months at the farthest, and if, by any possibility, the vesting may be postponed beyond this period, the limitation will be void; and the period from which the rule runs, is the death of the testator. *Sears v. Russell*, 8 Gray, 86.

The facts in the case at bar are within the rule. The limitation to the cousins would have taken effect in possession, if at all, by the events which have happened within the prescribed period; yet a state of facts might have existed in which it would not have taken effect within the time. The time, for aught that appears at the death of the testator, might have been extended by the birth of a child twenty years afterwards, who, within five years, should take the whole of the interest limited in the fourth article, as sole survivor of father, mother, brothers and sisters, and hold it for seventy-five years, and then die without heirs of his body; in which case, by the express terms of the will, the cousins would take under the limitation under consideration seventy-five years after the expiration of lives in being.

We do not think that the *proviso* in the eleventh section of the act regulating decents, distribution, and dower, of

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February 17, 1838, in force at the death of the testator, changed this rule. That *proviso* can have its full force and effect without changing the rule against perpetuities. It could hardly be the intention of the legislature to make a change in favor of perpetuities in a section abolishing estates tail after the second generation.

The limitation being void as to the cousins, and the grand children of the testator not taking a vested, but a contingent remainder, the fee, subject to the life estate of the widow of Camilas Evans and the contingent remainder to the grandchildren, either passed under the residuary clause in the third article, or descended under the law of decents in force at the death of the testator.

From this it would follow that Dewit C. Evans, at the time he joined with his mother in the deed to Henry C. Stephens, was the owner in fee of one undivided half of the land conveyed, subject to the life estate of his co-grantor. As Henry C. Stephens is in possession of the land under a deed with full covenants, he can only insist upon a defense to the notes given for the purchase money on the ground of entire failure of title. *James v. The Lawrenceburgh Insurance Co.*, 6 Blackf. 525; *Whisler v. Hicks*, 5 Blackf. 100; *Smith v. Ackerman*, *id.* 541.

There has as yet been no breach in the covenants in the deed entitling the appellant to recover back any part of the purchase money. Henry C. Stephens is seized and possessed of the whole land under the deed for the life of one of the grantors, and of the undivided half of the remainder in fee. His possession as yet is rightful under the deed.

The judgment is affirmed, with costs.

C. Baker, J. G. Jones, and C. H. Butterfield for appellants.

A. Iglehart and C. Denby, for appellee.

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NEGLIGENCE.—*Excavation in Sidewalk of City.—Injury to Person.*—The owner of a lot in a city, having, by permission of the city authorities, caused an excavation to be made in a sidewalk along which people are accustomed to pass, for the purpose of constructing an area by the side of a building to be erected on such lot, it is his duty to see that proper protection against injury to persons passing along the sidewalk is provided; and if, in consequence of such excavation being insufficiently guarded, a passer on the sidewalk falls in and is injured, without his own fault, the lot at the time, for the purpose of constructing the area and erecting the building under a contract, being in the exclusive possession of a third person, the contractor, who has complied with the stipulations of his contract, the owner is liable for the injury so received.

SAME.—Contractor.—Recovery Over Against.—Where there is no provision in the contract that the contractor shall have exclusive possession of the lot, or stipulation that he shall keep the area properly guarded during the progress of the work, as between him and the owner, there is no implied obligation that the contractor shall keep it so guarded, whatever liability he may incur to others by leaving it unguarded; and, having performed his work according to the contract, he is not liable over to the owner for damages recovered against the latter for such injury.

CONTRIBUTION.—Joint Wrong Doers.—Where a recovery has been had against one of several joint wrong doers, he has no remedy against the others for contribution.

APPEAL from the Laporte Circuit Court.

ELLIOTT, J.—This was an action by Nerdlinger and Oppenheimer against Silvers, the appellant. It is alleged in the complaint that on the 10th of April, 1865, Silvers contracted with the plaintiffs to erect for them a building on a lot on the corner of Columbia and Calhoun streets, in the city of Fort Wayne, and that the plaintiffs, for that purpose, delivered to Silvers the exclusive possession of said lot; that there was a sidewalk in front of the lot, along which the inhabitants of the city were accustomed to pass and repass, and that during the erection of the building, Silvers, with the consent of the city authorities, made an excavation in the sidewalk, for the purpose of erecting the necessary walls and cellar ways of the building; that it

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was his duty, while so in the possession of the lot, to keep the pit, so excavated, sufficiently guarded and protected to prevent injury to persons passing along the sidewalk, which he negligently failed to do; and that in consequence of the pit being left exposed and unguarded, one Charles Dwelly, in passing along said sidewalk, fell into the pit and was greatly injured thereby; that Dwelly afterwards sued the plaintiffs in the Allen Circuit Court for the damages so sustained by him, in which suit he recovered the sum of one thousand dollars, and costs, all of which the plaintiffs paid.

The contract between the parties and a transcript of the proceedings and judgment in the suit of Dwelly against the plaintiffs are made part of the complaint. The contract does not provide that Silvers should have the exclusive possession of the lot, nor does it contain any provision requiring him to guard the area excavated in the sidewalk.

Silvers filed an answer of six paragraphs. The *first* is a general denial. The *second, fourth, and sixth* paragraphs were stricken out on motion, and a demurrer sustained to the *third*. No question arises on the *fifth*. The third paragraph denies that there was anything in the contract making it the duty of Silvers to guard the pit, and alleges that the excavation was necessarily connected with the work to be done under the contract; that during the progress of the work the plaintiffs had their place of business diagonally across the street from the excavation, not exceeding one hundred feet, and knew, at all times, how the excavation was protected; and that on the night of the accident, and just before the happening thereof, one of the plaintiffs passed along immediately by and in full view of said excavation, and well knew its condition and how it was guarded and protected.

The court—to which the cause was submitted for trial by agreement of the parties, without a jury—at the request of the appellant, found the facts specially, and the conclusions of law arising thereon, as follows:—"That on the 10th day of April, 1865, the plaintiffs and defendant entered into a

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written agreement, which is set forth in the complaint, by which the defendant agreed to furnish all the necessary materials and erect for the plaintiffs a building on a lot owned by the plaintiffs at the corner of Calhoun and Columbia streets, in the city of Fort Wayne; that it was a part of the contract that the defendant should make excavations in the sidewalk along the side of said building, for the purpose of constructing areas by the side of said building; that the plaintiffs delivered to the defendant the exclusive possession of said lot, for the purpose of erecting said building under said contract; that it was not specially provided in said contract that the defendant should guard said excavations by barricade or otherwise, during the progress of said work; that the defendant did, during the progress of said excavations, attempt to guard the same, but that on the night of the 28th day of October, 1865, and whilst the defendant was in the exclusive possession of said lot, in the performance of said contract, the said excavations were not sufficiently guarded or protected, and that one Charles Dwelly fell into said excavation and was injured; that on the 16th day of March, 1866, said Dwelly commenced a suit in the Allen Circuit Court against the plaintiffs to recover damages for said injury, and recovered judgment therein for one thousand dollars and costs, taxed at ninety-eight dollars, all of which the plaintiffs paid, on the 1st day of January, 1867, and before the commencement of this suit. And the court finds that the defendant knew of the pendency of said suit in time to make his preparations and defend the same, on the trial, but that he did not defend the same; that said notice was not given him by said plaintiffs; that the knowledge thereof was communicated to him by citizens of Fort Wayne; that he knew of the time of the trial thereof. And the court further finds that the plaintiffs had full knowledge of the progress of said work, the digging of said pit, and the manner of protecting the same by the defendant, during the progress of the work, and on said 28th day of October, 1865.

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And the court finds, as a conclusion of law upon said facts, that said defendant is bound by said judgment, and liable to pay the amount thereof, with interest thereon from the date of the payment thereof, amounting to fifty-five dollars."

Silvers excepted to the conclusions of law as stated by the court; and also moved for a new trial, for the reasons that the finding of the court is contrary to law, and to the evidence in the case. Which motion the court overruled, and rendered judgment for the plaintiffs for \$1,153 and costs.

The errors assigned are:—1. The court erred in sustaining the demurrer to the third paragraph of the defendant's answer. 2. The court erred in the conclusions of law arising upon the facts. 3. The court erred in overruling the appellant's motion for a new trial.

It is insisted by the appellant's counsel that the complaint does not show a valid cause of action in favor of the plaintiffs below, and that the demurrer to the third paragraph of the answer should, therefore, have been overruled.

The same question, substantially, is presented by the exception to the conclusions of law stated by the court, arising upon the facts so specially found. Several questions are presented in argument as reasons why the conclusions of law stated by the court are erroneous; one of which is, that Silvers did not have such notice of the suit of Dwelly against the plaintiffs below as to bind him by the judgment in that case, even if he is answerable over to them, which is denied.

The case will be disposed of by the conclusion to which we have arrived upon the question of the liability of Silvers to Nerdlinger and Oppenheimer upon the facts as they appear in the complaint, as well as by the special findings of the court; and will render it unnecessary that we should examine the question of the sufficiency of the notice to Silvers of the Dwelly suit to bind him.

That Nerdlinger and Oppenheimer, for whom the area was excavated, were legally liable to Dwelly, he not being

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in fault, is not controverted by them. Indeed, their right to recover over against Silvers, the contractor, is based by them on the assumption that they were properly so held liable; for, if they were not liable to Dwelly, it could not be claimed, with any show of plausibility, that Silvers, however formally notified of that suit, would be concluded by the judgment, or thereby rendered liable to refund the amount recovered against them without authority of law.

It is claimed, however, as Nerdlinger and Oppenheimer were made liable to Dwelly, because the area was constructed by their procurement and for their use and benefit, that Silvers is liable over to them, because he had the exclusive possession of the lot at the time, and it was his duty as contractor to keep the area properly guarded.

It was held by the Supreme Court of Pennsylvania, in the case of *Painter v. The Mayor &c. of Pittsburgh*, 46 Penn. St. 213, that where a person employs another, exercising a distinct employment, to do work by a special contract, for a stipulated sum, and does not interfere with the mode of performance, he is not responsible for the acts or negligence of the contractor or his employees; and the principle was applied in favor of the city of Pittsburgh, against which the suit was brought to recover damages for causing the death of a person, who, in passing along one of the streets of the city, fell into a pit, excavated in the erection of a sewer that was being constructed for and under a contract with the city, and which was negligently left open and unprotected by proper barricades.

The principle enunciated in that case has been much discussed by the courts, both in England and this country. Many of the cases are collected in a note to that case in 3 Am. Law Reg. (N. S.) 350, and will be found to be in direct conflict. The proper rule on the subject seems to be that laid down by the Supreme Court of the United States, in *The City of Chicago v. Robbins*, as follows:—"Where the obstruction or defect, caused or created in the street, is purely collateral to the work contracted to be done, and is

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entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." The same distinction is fully recognized in *Storrs v. The City of Utica*, 17 N. Y. 104.

The recovery in this case against Silvers, as we have seen, is based on the assumption that Nerdlinger and Oppenheimer were properly held liable to Dwelly. Admitting this to be so, then the question is, does the law arising upon the facts of the case hold Silvers responsible to answer over to them?

In the discussion of this question we put out of view all question as to the sufficiency of the notice to Silvers of the pendency of that suit, to make it conclusive upon him, if he is otherwise liable.

Here the area was dug by permission of the city authorities, who had exclusive control over the streets. It was a special favor granted to Nerdlinger and Oppenheimer alone, as the owners of the lot, and the benefits resulting therefrom enured exclusively to them, and it was their duty to use every reasonable care that the privilege thus granted should be so exercised as not to become a nuisance, or produce injury to others; and sound public policy, as well as justice, requires that they should be held responsible for any injury caused by a neglect of that duty.

It is said in the case of *The City of Chicago v. Robbins*, 2 Black, U. S. S. C. 418, that the owner of a lot for whose benefit such an area is constructed, cannot escape liability by letting the work out to a contractor, and shift responsibility on him if an accident occurs. "He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large city, and left without guards and lights at night, without great danger to life and

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limb, and he who orders it dug, and makes no provision for its safety is chargeable if injury is suffered."

The digging of the area was lawful. It was not a nuisance, *per se*, but was rendered such by the neglect to keep it properly protected and guarded so as to avoid injury. It was the duty of Nerdlinger and Oppenheimer, at their peril, to see that it was so guarded. They neglected that duty, whereby the area became a nuisance, and the injury resulted to Dwelly. By that neglect they became wrong doers, and were properly held responsible. They did not protect the area, nor even use the precaution to provide in the contract that Silvers, the contractor, should do so. The construction of the area was a necessary part of the work in the erection of the building. Silvers was required to construct it by the contract, and no complaint is made as to the manner in which the work was done. The obstruction, then, which occasioned the injury, resulted directly from the acts which Silvers agreed and was authorized to do; and hence it was the duty of Nerdlinger and Oppenheimer, who employed him and authorized him to do those acts, to see to it, that the area was so guarded as to prevent injury. The contract imposed no obligation on Silvers, as between him and Nerdlinger and Oppenheimer, to guard the area; it simply required him to execute the work in a proper manner. If they had required Silvers to stipulate in the contract that he would keep the area properly guarded during the progress of the work, and he had failed to do so, by which they were held liable, Silvers would unquestionably have been liable to them on his contract; but as no such stipulation was made in the contract, no implied obligation to that effect arises from it as between these parties, whatever liability Silvers may have incurred to others, by leaving the area unguarded. If Silvers, by digging the area and leaving it unprotected, made himself amenable to Dwelly, he thereby, at most, only became a joint wrong doer with Nerdlinger and Oppenheimer, who procured it to be dug, and were therefore alike bound to see that it was kept properly guarded.

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They might both have been liable to Dwelly, but both being wrong doers *in pari delicto*, neither would be liable to answer over to the other. It is well settled that one of several joint wrong doers, against whom a recovery has been had, has no remedy against the others for contribution.

The conclusion reached in this case is very fully sustained by the Court of Appeals of New York, in *The City of Buffalo v. Holloway*, 3 Seld. 493. There, the City of Buffalo contracted with Holloway for the erection of a sewer in one of the streets of the city. In the proper execution of the work Holloway dug a pit or hole in the middle of the street, about twelve feet in length, four feet wide and fifteen feet deep, and neglected to guard it at night with proper lights and barricades; in consequence of which, one Tripp, while lawfully passing along the street, without fault on his part, fell into the pit and was greatly injured. Tripp sued the city and recovered \$1,067.62. The city thereupon sued Holloway to recover back said sum. The contract contained no provision that Holloway should keep the pit guarded during the execution of the work, but it was averred in the complaint, as it is here, that it was the duty of Holloway, as the contractor, to use due care while the pit remained open to properly guard the same with proper lights, guards, and barricades, so as to protect persons passing on and along the street from injury.

The question arose on a demurrer to the complaint, which had been sustained by the lower court. The Court of Appeals, in holding the complaint bad, say:—"The City of Buffalo was bound to exercise its right in constructing the sewer in a careful and prudent manner, so as to avoid injury resulting to others from it; and if it were prudent and necessary to erect, maintain, and keep lights, guards and barriers about, and in the vicinity of the place excavated, during the progress of the work, in order to protect and prevent persons lawfully traveling and passing along the street from unavoidably falling into the pit or hole, and thereby sustaining injury, it was its duty to do so, and con-

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sequently it is liable for injuries occasioned by the want of such proper precautionary measures. As between the city of Buffalo and the defendant, the obligation of the latter extended no farther than to perform his part of the contract made for the construction of the sewer according to its terms, with reasonable skill, and consequently, he is only liable to the city to compensate it for such injuries as it sustained for the want of the exercise of such skill in the performance of his contract * * *. It will be observed, that it is not stated or alleged in the complaint that it was not necessary for the defendant, in order to construct the sewer in pursuance of the terms of his contract, to excavate the pit or hole in every respect as it was done, or that there was any lack of skill manifested in executing the contract in that respect." It is further said in that case, that if the excavation in the street was such as to require that it should be guarded, "the city might have contracted with the defendant to take such precautionary measures; in that event the duty, as between him and the city, would have devolved upon him, and he would have been liable for all the consequences resulting to it for any neglect on his part in observing his stipulations in that respect; or the city may have judged the measures unnecessary, and therefore omitted to provide for them in its contract with the defendant, or, if otherwise, the city might have chosen to contract for the doing of that service with some other person. In either case the defendant would owe no such duty to the city, whatever liability he might have incurred to others." The ruling in that case was approved in the subsequent case of *Storrs v. The City of Utica, supra.*

The appellees seem to rely upon the case of *The City of Chicago v. Robbins, supra*, as sustaining their right to recover against Silvers. We do not so understand that case. There the area was constructed by Robbins for his own exclusive use and benefit, under an implied license of the city. It was left for a considerable time without sufficient guards or covering, which was known to Robbins.

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Woodbury, in passing along the sidewalk, without negligence on his part, fell into the area, and was seriously injured. He sued the city, and recovered a judgment for over two thousand dollars. The city thereupon sued Robbins as the wrong doer in fact, to compel him to refund the amount so recovered by Woodbury. It was held by the Supreme Court, that the city, having exclusive control over the streets, was bound to see that they were kept in proper repair and condition to avoid injury to those passing along the same, and was therefore primarily liable to Woodbury for the damages occasioned to him by the area being left open without proper guards; but that the city, not being a wrong doer in fact, could compel Robbins, who alone was at fault, and for whose exclusive benefit the area was constructed, to answer over to the city for the amount recovered by Woodbury. The decision is clearly put upon the ground that Robbins was alone to blame, and that no fault, in fact, was chargeable to the city. The court say: "The rule of law is, that one of two joint wrong doers cannot have contribution from the other. It is difficult, in this case to see how the city was to blame, and least of all, how Robbins can impute blame to it." And (as bearing on the question of the liability of Silvers in this case) it is further said that "Robbins, in the exercise of his privilege, did not use even ordinary care. There is no provision in his contract with Button, nor with the men who laid the flagging or put on the iron grating, that they should provide proper lights and guards."

That case, in as far as it has any bearing on the one before us, so far from sustaining the right of the appellees here to recover against Silvers, seems to us as directly to the reverse. We think that neither the complaint nor the special finding of the court is sufficient to sustain the judgment against Silvers, and it must therefore be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to the Circuit Court to over-

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rule the demurrer to the third paragraph of the answer, and sustain it to the complaint.

J. B. & W. Niles and *J. A. Thornton*, for appellant.
J. L. Worden and *J. Morris*, for appellees.

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152	101
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155	200

JUSTICE OF THE PEACE.—Jurisdiction — Recognizance.—A justice of the peace has jurisdiction to take a recognizance for the appearance of a prisoner at a future time, to answer a general charge of an offense, so defectively stated in its details that the prisoner might well have objected to the sufficiency of the affidavit.

SAME.—Evidence.—The proceedings of a court of inferior and limited jurisdiction cannot be recognized as valid, unless the facts necessary to give jurisdiction in the particular case are affirmatively shown to exist; and the taking of a recognizance by a justice of the peace is within this rule.

APPEAL from the Vanderburgh Common Pleas.

FRAZER, J.—This was a suit upon a forfeited recognizance taken by a justice of the peace, conditioned for the appearance of Gachenheimer before the justice on a subsequent day, "to answer the charge of obtaining goods under false pretenses." There was an answer of general denial. The issue was found for the defendants, and the case is here solely on the evidence. The affidavit filed before the justice was defective. Gachenheimer was, however, arrested and brought before the justice upon a warrant. Upon his application the hearing was continued, to enable him to procure absent testimony, and the recognizance was taken for his appearance at the time thus fixed for the hearing.

The question is whether the justice had jurisdiction to take the recognizance. For the appellee it is argued that a sufficient affidavit was necessary to confer that jurisdiction. The jurisdiction of justices in such cases is wholly derived

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from the statute. It is enacted that "any justice shall, on complaint made on oath before him, charging any person with the commission of any crime or misdemeanor, issue his warrant," &c. 2 G. & H. 636.

When the proceeding is attacked collaterally, as in this case, all reasonable intendments, and as large a latitude of construction as can be deemed fair, will be indulged to support the jurisdiction; and, accordingly, in such cases as this, a distinction is taken by the authorities between a general charge of an offense defectively stated, and no charge of any offense. If there is a colorable charge, though defective, then the jurisdiction exists—there is something to put the judicial mind in motion. It would be a most mischievous doctrine that, for a mere defect in the affidavit upon which a warrant issues, there is no jurisdiction, thus exposing the justice to liability for false imprisonment in every such case. That most useful and necessary court would cease, for the reason that no citizen could be found willing to incur the hazards incident to the office.

As we understand the evidence, the affidavit did charge generally that Gachenheimer had "obtained property, or goods, or promissory notes, from one Weis, by false pretenses." The false pretenses specifically charged were, however, so defectively stated that the prisoner might well have objected to the sufficiency of the affidavit. The paper itself was lost, and its contents were proved orally, though its exact form was not given by any witness. The effect of the evidence concerning it is as we have stated it. This brings the case within the rule already announced. There was an offense charged, but not sufficiently stated in its details, and the justice, therefore, had jurisdiction to inquire and take the recognizance. It follows that a new trial should have been awarded.

The nature of the appellant's argument justifies here some consideration of another question which was considered and decided when this case was formerly here. We then held the evidence insufficient to sustain a verdict for the plaintiff,

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because there was no proof of the facts necessary to give the justice jurisdiction. *Gachenheimer v. The State*, 28 Ind. 91. The appellant now earnestly questions the correctness of that decision, and calls upon us to review it. In *Hawkins v. The State*, 24 Ind. 288, we had held the same doctrine. Indeed, we regarded it as too familiar a proposition to justify discussion, that the proceedings of a court of inferior and limited jurisdiction cannot be recognized as valid, unless the facts necessary to give the jurisdiction in the particular case are affirmatively shown to exist, and that a recognizance, a debt of record, taken by a justice of the peace is within the rule. It was so held in *Bridge v. Ford*, 4 Mass. 641, and *Commonwealth v. Downey*, 9 Mass. 520. So, also, in *The People v. Koeber*, 7 Hill, 39; *The People v. Young*, *id.* 44; and *The State v. Smith*, 2 Greenl. 62. In these cases the very question was distinctly presented and decided, and nothing in the law is more fully recognized by innumerable dicta everywhere than this doctrine, and its application to this precise class of cases. But in *The People v. Kane*, 4 Denio, 530, the cases in Hill were overruled, against the dissent of one of the judges, whose opinion, then delivered, is so fortified by reason and authority, that it is surprising that any judge ventured to put himself upon the other side of the question. It was, however, done by the Chief Justice, who found no reported case to support his views, and summarily put aside all authority by saying that the point was not necessary to be decided in the Massachusetts and Maine cases, and that the cases in Hill gave too much importance to what he chose to term the "dicta" of the other cases mentioned. We cannot adopt so easy a method of disposing of cases exactly in point. Nor was the reasoning of the Chief Justice so conclusive as, in our opinion, to justify this disregard of the adjudged cases. A distinction was taken between cases where a burden is attempted to be fastened on a party *in invitum*, and where that burden is voluntarily assumed. It

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was taken for granted, without argument, that a recognizance is voluntarily given without any order of the magistrate requiring it, and, of course, without any impending imprisonment to constrain it. An innovation, in the face of all pre-existing authority, and supported by reasoning so much exposed to just criticism, may not be adopted with safety to the just rights of the citizen.

The judgment is reversed, with costs, and the cause remanded for a new trial.

D. E. Williamson, Attorney General, *W. P. Hargrave*, and
J. G. Jones, for the State.

A. Iglehart, for appellees.

PENCE *v.* MCPHERSON.

CONTRACT.—*Construction of.*—A contract provided: “Both parties are to use due diligence in procuring all necessary logs and timber for the employment of said mill, and bear equal expense in procuring the same, and also to share equally in all expenses necessary in procuring the necessary hands and teams to run said mill, and are to share and share alike in the profits thereof.”

Held, that this provision did not require either party to furnish a definite part of the logs, teams, or hands.

PRACTICE.—*Demurrer.*—A judgment will not be reversed for overruling a demurrer to a bad paragraph of an answer in support of which no evidence was given on the trial.

SAME.—*Motion to Strike Out.*—A paragraph of an answer which does not differ in substance from another paragraph should be stricken out on motion, but overruling such a motion is a harmless error, for which a judgment will not be reversed.

ESTOPPEL BY DEED.—A. and B. were partners in a grist mill, to which was permanently attached a circular saw mill, in which C., who had no ownership in the real estate, held an interest. A. and B. sold, and by their joint deed conveyed the entire property, including, with C.’s assent, the saw mill.

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Held, in a suit by C. against A., the surviving partner, to recover the value of the saw mill, that the latter was estopped from saying he did not acquiesce in its sale.

APPEAL from the Clinton Common Pleas.

ELLIOTT, J.—Suit by Pence, the appellant, against McPherson. The case presented by the complaint is this: McPherson, Haun and Wilson, who were partners and the owners of a grist and saw mill in Clinton county, on the 14th of December, 1858, in and by their firm name of "John H. Haun & Co." entered into a written contract with Pence, by which it was agreed that Pence should furnish a double circular saw mill, and have the same put up in the steam mill of Haun & Co., and attached to the steam engines in said mill, and put in good running order; Haun & Co. to pay one-half of the entire cost of the circular saw mill, and the expenses of putting it up, over and above the sum of five hundred dollars; the saw mill to remain in the mill of Haun & Co. for five years, and as much longer as the parties might agree; Haun & Co. to furnish the necessary power to run it, and all the other expenses in operating it to be borne by the parties equally, and the net profits derived therefrom to be equally divided between them; the property in the saw mill "to be absolutely vested, and remain in said Pence, and not, in any event, subject to any debts or obligations of, or judgments against, said firm of Haun & Co., or either of the individual members of said firm, save only that they, the said Haun & Co., are to be invested with such proportion of the property of said mill as any payment which they may make on the purchase, delivery, and expense of erecting the same may justly entitle them to." And it is alleged that Pence, pursuant to said agreement, did, immediately thereafter, purchase and erect, in the mill of Haun & Co., a saw mill, in all respects corresponding to that described in said contract, at an expense of seven hundred dollars, the whole of which he paid; that said saw mill remained in the mill of Haun & Co., and was operated under the agreement until the 17th day of September, 1860,

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at which time Haun & Co. sold and conveyed their mill property and the circular saw mill to Hood & Davis, for the gross sum of ten thousand dollars, and delivered to them possession thereof; that the circular saw mill, at the date of said sale, was of the value of seven hundred dollars, which Haun & Co. appropriated to their own use, and refuse to pay the same, or any part thereof, to the plaintiff; that Haun and Martin afterwards died, leaving the defendant McPherson the sole surviving partner. The defendant answered in four paragraphs. 1. The general denial. 2. That Haun & Co. paid three hundred dollars on the purchase of said circular saw mill, and one hundred dollars of the expense of shipping and putting it up; and that the plaintiff was indebted to them in the further sum of seven hundred dollars for services rendered him, and for money paid to his use, all of which is presented as a set-off against any amount found due the plaintiff, and prays judgment for the residue. 3. Set-off, substantially the same as the second. 4. This paragraph alleges that the plaintiff failed to furnish one-half of the hands to run the saw mill, and failed to furnish logs therefor, or teams to haul logs, by reason whereof the mill was idle a large portion of the time, to the defendant's damage five hundred dollars; "all of which it was agreed and understood between the parties should be settled out of the proceeds of the same after sale."

The second and fourth paragraphs were demurred to, and the demurrers overruled. The court also overruled a motion to strike out the third paragraph. To these rulings the plaintiff excepted, and then filed a reply to said paragraphs. 1. A general denial. 2. Alleging that all the matters therein set up were fully settled and adjusted between the parties before the commencement of the suit.

The issues were tried by the court, by agreement of the parties, without a jury. Finding and judgment for the defendant, a motion for a new trial having been made and overruled.

The appellant insists that the court below erred in over-

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ruling the demurrsers to the second and fourth paragraphs of the answer. The objection urged to the second paragraph is, that no bill of particulars was filed with it. The record, as we understand it, does not sustain the objection; it contains a quite lengthy bill of particulars, and it is evident that both the court and the parties understood it as applicable to the answer, from the fact that it appears that the appellant moved the court to strike it out, which was overruled. The ruling on the demurrer to the fourth paragraph presents a different question. The matters set up in that paragraph are in the nature of a counter-claim, but it presents no defense, for the reason that the contract between the parties did not impose upon the plaintiff the obligation to furnish a definite portion of the logs for the mill, or the teams to haul them, or the necessary hands to run the mill, the failure to do which is complained of in that paragraph. The contract provides that, "both parties are to use due diligence in procuring all necessary logs and timber for the employment of said mill, and bear equal expense in procuring the same, and are also to share equally in all expenses necessary in procuring the necessary hands and teams to run said mill, and are to share and share alike in the profits thereof."

This provision of the contract requires both parties to use diligence in procuring logs for the mill, and charges each with an equal moiety of all the expense of logs, teams and hands, or, in other words, all the expenses are first to be paid from the gross earnings, and the net profits to be divided equally. It does not provide that each shall procure half the logs, or half the teams or hands, but that the expenses thereof shall be shared equally.

We think the paragraph is bad, and that the demurrer to it should have been sustained. But we cannot reverse the judgment for that error, for the reason that the evidence given on the trial is all in the record, and it appears therefrom that no evidence was given or offered in support of

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that paragraph. The plaintiff was not injured, therefore, by the error.

The appellant also complains of the ruling of the court in refusing to strike out the third paragraph of the answer.

As that paragraph did not differ in substance from the second, it simply encumbered the record, without being of any advantage to the defendant, and should have been stricken out; but the ruling of the court could not prejudice any substantial right of the appellant, and, under repeated rulings of this court, the judgment should not be reversed for a harmless error.

The only remaining question arises upon the refusal of the court to grant a new trial on the ground that the finding for the defendant is contrary to the evidence. It appears from the evidence that Pence, promptly, after making the contract with Haun & Co., purchased the circular saw mill at a cost of five hundred and sixty dollars, and had it brought to, and put up in, the mill of Haun & Co. In the language of the witness, it was "permanently and solidly bolted and fastened down" into the frame of the steam mill. The cost of transportation and putting it up, added to its cost in Cincinnati, made a total of six hundred and sixty dollars, of which sum Hood paid for Haun, or Haun & Co., one hundred and seventy dollars, and Pence paid the residue. The saw mill was run, under the contract between the parties, until the 17th of September, 1860, at which time Haun & Co., then consisting of Haun and McPherson, sold and conveyed the entire mill property to Hood and Davis, for the gross sum, as is stated in their deed, of twelve thousand dollars.

This sale evidently included the circular saw mill. It is true that McPherson testifies that he did not sell it, or acquiesce in the sale thereof to Hood and Davis, nor did he derive any benefit from the sale, but says that the grist mill belonged to him and Haun, and the saw mill to Haun and Pence. He does not deny that the saw mill was sold with the grist mill, both being sold together as one prop-

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erty, and for a sum in gross, and passed by the same deed of conveyance in which he joined. He concedes that the saw mill was sold to Hood and Davis, and does not pretend that the sale was made by Pence, or that any value was fixed or agreed upon for the saw mill, separate from the amount to be paid for the grist mill. By the terms of the contract between Haun & Co. and Pence, the saw mill was regarded as personal property. It was permanently attached, however, to the frame of the steam mill, and Haun & Co. were bound to suffer it to remain there, and to furnish power to run it, for the period of five years, over three years of which were unexpired at the time of the sale to Hood and Davis. Haun & Co.'s hands were thus tied by their contract with Pence, and they could not well sell their mill property, unless, by the assent of Pence, it could all be sold together. Pence did assent. It was sold together, and McPherson joined in that sale and conveyance. Haun may have been the active agent in making the sale, but McPherson was his partner; he joined in the conveyance, and cannot now be heard to say that he did not acquiesce in the sale.

That Pence is entitled to recover, we think is very clear from the evidence, but the amount to which he is thus entitled is not entirely free from doubt. The saw mill, as we have seen, cost when put up, six hundred and sixty dollars, and the evidence shows that, at the time of the sale to Hood and Davis, it was worth its original cost, less the depreciation by its use, which the witnesses testify to be from fifty to one hundred dollars. But it appears that Haun & Co. paid one hundred and seventy dollars of the original cost, and by the terms of the contract became joint owners with Pence in the proportion that sum bears to the whole cost. A settlement, however, seems to have been made between the parties, after the sale of the mill, "of the partnership accounts growing out of the putting up and running of the mill," in which Pence fell in debt to Haun & Co., in the sum of fifty-six dollars, which he secured by note. Whether the

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one hundred and seventy dollars paid by Haun & Co. was included in that settlement, is not shown, nor is it at all material to the decision of the question involved in this court. The court erred in refusing a new trial.

The judgment is reversed, with costs, and the cause remanded for a new trial.

J. N. Sims, for appellant.

L. McClurg, for appellee.

STILWELL and Another v. CHAPPELL.

VENDOR AND PURCHASER.—*Incumbrance.—Recoupment.*—In a suit by the assignee against the maker of a promissory note given as the last payment on certain real estate conveyed by warranty deed, the purchaser who had paid all the consideration money except the note in suit, was properly allowed to recoup an amount which he had been compelled to pay to discharge an incumbrance not excepted from the warranty, being a note secured by mortgage on said real estate, other notes secured by the same mortgage being so excepted in the deed.

PRACTICE.—*Withdrawal of Submission for Trial.*—Erronously permitting the submission of a cause to the court for trial to be withdrawn, after all the evidence has been heard and before finding, is not a good cause for setting aside a trial had at a subsequent term.

SAME.—*Assignment of Errors.*—Where the overruling of a motion for a new trial is not assigned as error, questions which should be included in such a motion will not be considered by this court on appeal.

APPEAL from the Madison Circuit Court.

RAY, C. J.—This was an action by appellants upon a note executed by the appellee to one Loyd Brown for nine hundred dollars, and assigned to appellants. The appellee answered, that the note was given as the last payment on certain real estate sold by said Brown to the appellee; that all the consideration money for such sale had been paid except this note, and that said property had been sold subject

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only to certain liens, which are set out, and that a warranty deed had been executed conveying the property to the appellee; that, subsequently, the appellee had discovered that another incumbrance upon the said real estate existed, being a note for seven hundred and fifty dollars, payable seven years from date, with interest payable yearly, which was not excepted from the warranty, and he had been compelled to pay the same off, with the interest and costs amounting to the sum of one thousand dollars, which he asked to recoup against the note in suit. The answer contained a copy of the deed, by which it appeared that the incumbrance referred to was not included in the liens described in the conveyance. A demurrer was overruled to this answer, and this ruling is assigned for error.

We can see no defect in the answer, nor do the appellants point out any, beyond the claim they make that this note of seven hundred and fifty dollars was excepted in the deed from the covenant of warranty. No such note, however, is described in the conveyance, and the answer expressly avers that all the notes therein mentioned had been paid off by the appellee, and that the note described in the answer was another note, although included in the same mortgage with two notes described in the deed. The demurrer was properly overruled.

It is also assigned as error, that after the cause had been submitted to the court for trial, at the April term, 1866, and all the evidence had been heard, the court allowed the appellee, upon affidavit of surprise, to withdraw the submission, and granted a continuance to the next term of the court, when a trial was had, from the result of which trial this appeal is taken. If the action of the court was erroneous in permitting the submission to be withdrawn, still we cannot see how it can avail the appellant. If it is a good cause for setting aside a subsequent trial, it would be equally good for disregarding all subsequent trials, and the litigation would have no end. The submission being withdrawn,

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prevented any result being reached upon that submission from which an appeal could be taken.

There are a number of questions argued in the brief by appellants' counsel, but as they all should be included in a motion for a new trial, and no error is assigned upon the action of the court in overruling such a motion, we cannot consider them, without a disregard of the law.

The judgment is affirmed, with costs.

W. R. Pierse and H. D. Thompson, for appellants.

J. Davis and J. W. Sansberry, for appellee.

KOONS v. MCWHINNEY.

PROMISSORY NOTE — Pleading.—A note payable in bank, negotiated by the payee, the partner of the maker, was paid at maturity, out of partnership funds, by the payee, who charged the amount to the maker's account. On a subsequent settlement of accounts between the maker and payee, it was agreed that the latter should hold said note, unaltered, for a balance then found due him.

Held, in a suit by the payee against the maker, that there could be no recovery on the note, pleaded as it appeared on its face—that the complaint should have declared upon it as reissued for a new consideration.

APPEAL from the Wayne Civil Circuit Court.

RAY, C. J.—The complaint was in two paragraphs. The first was upon a note dated May 10th, 1860, payable sixty days after date, at the Citizens' Bank, Richmond, Indiana, executed by the appellant. The second paragraph was for goods sold and delivered, for money lent, and for money paid at defendant's request.

There was an answer in six paragraphs: 1. Payment. 2. Want of consideration in the note. 3. That the plaintiff and defendant were jointly engaged in buying and packing pork, and the note was executed for the purpose

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of being negotiated to raise money on joint account, and that it was so negotiated, and was paid when due, out of the funds of the partnership. 4. That the note was executed and negotiated for the benefit of the defendant, and paid by plaintiff out of funds in his hands belonging to the defendant. 5. Set-off to the account and note. 6. General denial.

The reply was a general denial, plea of payment, and set-off.

On the trial there was proof that the note was executed to raise money for the purchase of hogs, and that the plaintiff paid off the note from the funds of the partnership, and charged the amount to the defendant's account; that at a subsequent date, upon settlement between the plaintiff and defendant, a balance was found due the plaintiff, somewhat exceeding the amount of the note, and it was agreed that this note was to be held for that indebtedness. The court instructed the jury as follows: "The evidence discloses the fact that the note sued upon was given by the defendant May 10th, 1860, payable to the plaintiff at the Citizens' Bank, at Richmond, sixty days after date. The note was indorsed by the plaintiff, and negotiated in the bank. At maturity the plaintiff paid the note in bank, and charged the defendant on his books with the amount paid the bank to redeem the note, but still held the note in his possession. If you believe, from the evidence, that the parties subsequently met and had a settlement of all their accounts, and it was agreed between the parties that the defendant was indebted to the plaintiff in the amount of the note and interest then due upon the same, and that the plaintiff should hold said note for the amount so found due him, if there was no fraud or mistake in such settlement, the plaintiff should recover the amount of the note and interest." The giving of this instruction was assigned as ground for a new trial.

The note was declared upon as it appeared upon its face. If there had been an error in its date, the complaint might,

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perhaps, have been amended, if it did not change the issue before the jury. But in this case there was no error in date. The note was executed and delivered as a valid note at the day it was dated. It was so declared on, and the plea of payment was substantially proved. To permit a recovery upon that note under the pleadings, would simply be to allow one cause of action to be stated in a complaint and another proved on the trial. The complaint should have declared upon the note as reissued for a new consideration, and thus have avoided the plea of payment. As an original instrument, it had, as charged in the complaint, been executed and negotiated, and, as alleged in the answer, it had been paid, and its vitality depended upon its reissue. The instruction was wrong.

The judgment is reversed, and the cause remanded for a new trial. Costs here.

C. H. Burchenal, for appellant.

J. P. Siddall, for appellee.

DODD v. THE STATE, on the relation of RYAN.

BASTARDY.—Costs.—Where the relatrix in a prosecution for bastardy dismisses the suit by entering of record an admission that provision for the maintenance of the child has been made to her satisfaction, it is error to adjudge costs against the defendant.

APPEAL from the Johnson Common Pleas.

RAY, C. J.—This was a proceeding in bastardy. The relatrix filed a statement, pending the proceeding in the Court of Common Pleas, admitting that provision had been made for the support of the child, and dismissing the suit.

The court rendered judgment for costs against the defendant. This was error. We have no statute authorizing a

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judgment against the defendant in such a case, where a dismissal has been filed by the relatrix. Our statute authorizes such a dismissal, but the relatrix must regard the question of costs, in determining whether, in the language of the law, "provision has been made for the maintenance of the child to her satisfaction."

The judgment for costs is reversed, and the cause remanded.

S. Major, for appellant.

B. F. Davis, for appellee.

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145	250
147	491
80	77
154	479
156	344
30	77
163	606

ASSESSMENT.—TAXATION.—Constitutional Law.—The Constitution of our State recognizes a distinction between taxation for general purposes and assessments for improvements resulting in special benefit to property.

SAME.—Limit of.—The only limit upon the legislative exercise of this power of assessment in any given case is, that the subject matter for which the assessment is made shall result in local benefit to property within some special district, as distinguished from a more general good accruing to the people as citizens, and that the assessment shall be uniform and equal upon all property receiving special benefit.

SAME.—Streets.—Highways.—Streets and highways are both equally proper subjects for the application of the principle of assessment.

SAME.—Gravel Road Law.—The provisions of the act of March 11th, 1867 (Acts 1867, p. 167), authorizing the assessment, to the extent of the benefits received, of all lands within one and one-half miles on either side, or within the like distance of the terminus of any plank, macadamized, or gravel road, organized under "an act authorizing the construction of plank, macadamized, and gravel roads," approved May 12th, 1852, are not in conflict with section 1 of article 10 of our constitution, nor with that part of section 22, article 4, which prohibits the General Assembly from passing local or special laws for the assessment and collection of taxes for state, county, township, or road purposes.

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SAME.—*Toll.*—That a toll is exacted, to maintain the expenses of the highway and make it a free public road in time, does not render the law invalid.

APPEAL from the Jefferson Circuit Court.

RAY, C. J.—The appellants filed their complaint, averring that they are the owners of real estate within one and one-half miles of either side and of the terminus of the appellee's road, the said appellee being a corporation, organized under the act of 1852, authorizing the construction of plank, macadamized, and gravel roads. 1 G. & H. 474. It is alleged that the appellee has procured the Board of County Commissioners of Jefferson county to make an assessment of the benefits to accrue from the construction of said road to the said real estate so situate, belonging to the appellants, and that the auditor of said county is proceeding to place the amount so assessed upon the tax duplicate for the year 1867, to be collected as other taxes. An injunction is prayed against the appellee and the auditor and treasurer of said county. Issues were formed, a trial was had, and there was a special finding by the court for the appellee.

The point presented by the record for our consideration, is the legality of the assessment upon the real estate for the purpose of the construction and completion of the road. This assessment is made under the authority of an act authorizing the assessment to the extent of the benefit received, of all lands within one and one-half miles on either side, or within one and one-half miles of the terminus of any plank, macadamized, or gravel road, organized under the said act of 1852. Acts of 1867, p. 167.

It is objected that this mode of requiring the payment of money is in conflict with that part of section twenty-two, article four, of our State Constitution, which prohibits the General Assembly from passing local or special laws for the assessment and collection of taxes for state, county, township, or road purposes.

It is also insisted that it comes in conflict with the first section of article ten of the Constitution, which reads as follows:—"The General Assembly shall provide by law for

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a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," &c.

In the case of *Palmer v. Stumph*, at the May term of this court, we examined the question as to the constitutional power of the legislature to provide for the construction and improvement of the streets in cities, by assessing upon adjoining property so much of the benefits which should result to such property as might be required to defray the expense of such improvement.

We found in what seemed to us a fair and reasonable construction of the language of the instrument which can alone limit the legislative power, ample authority for this method of requiring each piece of property which receives a peculiar and special benefit from such a work of improvement to contribute toward the expense incurred at least some portion of its enhanced value. The only limit, it seemed to us, upon the exercise of this power in any given case was, that the rate of assessment should be uniform and equal upon all property receiving special benefit; that is, an advantage from the improvement not enjoyed by the owners of all other property. This of course requires that the subject matter for which the assessment is made shall result in local benefit to property within some special district of country, and that among the motives which prompt the improvement, this special benefit is not lost sight of in the more general and larger good resulting to the people as citizens and entitled to the general care and protection of the law making power in common.

To aid us in the construction we placed upon the provision we have cited from our organic law, we looked indeed to the general course of legislation as it existed on such subjects before, at the date of, and subsequent to, the adoption of that controlling law. From that examination we found that the rule charging upon property receiving special benefit from any authorized local improvement the ex-

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penses attending such work, had been long and constantly recognized and indeed almost unchallenged in this State. Such a continued course of legislative action certainly strengthened us in the conviction that the convention which formed the constitution under which we are now acting intended to recognize a distinction between the general power of taxation for purposes in which, as citizens or inhabitants of either the state or smaller territorial divisions, all are generally interested, and assessments for improvements resulting in a special benefit to property, and therefore reasonably and justly chargeable with the expenses thereof.

The right to appropriate private property to a public use, to take for a highway a strip of land, springs from the right of eminent domain; the power to assess upon the adjoining property benefited by such highway being made the expense of its construction, rests in the power and right of the state to tax; but a constitutional convention may require that general taxation shall be upon a just valuation of all property both real and personal, and may also authorize the assessment at a uniform and equal rate of the expenses of any improvement upon the property benefitted. They have the power to impose conditions upon the legislature in the one case not enjoined in the other, although the foundation of each power rests in the inherent power of a government of the people to tax the people for its support.

Having determined from a construction of the constitution itself, and found support in legislative action for the construction adopted, a majority of the members of this court have not felt that it was proper to determine from the legislative exercise of a power given by the constitution, the limitation of the power, or the proper subjects which should call it into exercise. Indeed, we would feel still more reluctant to impose such a limitation upon a present existing statute simply because no prior legislative assembly had ever regarded it as expedient to exercise this power as applied to a given subject matter. Having found the power in the constitution, we should rather be expected to

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look to precedent authority and the reason for the rule, and thus determine the proper limit for its legislative exercise.

Streets and highways may be constructed by taxation, as distinguished from an assessment, but they both seem equally proper subjects for the application of the principle of assessment, on the ground of local benefit to property. They are constructed along the line or through the lands of a proprietor; they become a part of the improvement, or betterment, of the land itself; they are outlets required for its full enjoyment and use.

The application of this rule of assessment had been made to highways as early as 1691 in the county of Ulster, in the colony of New York (Bradf. Laws, 45). In that State it has been applied to highways, turnpikes, and the draining of marshes. In January, 1846, an act was passed in Ohio "to lay out and establish a free turnpike road from the town of Perrysburg to the north line of Wood county;" and the policy was adopted of constructing such roads in the north-western portion of that neighboring state, through the medium of corporations created for that purpose, and authorizing the assessment for their construction of a special tax upon lands situate within a given distance of the proposed road.

The application of the doctrine of assessments to the building of turnpikes through the medium of corporations was sustained in *Reeves v. Treasurer*, 8 Ohio St. 333. In *State v. City of New Brunswick*, 30 N. J. Law, 395, it was held that the city authorities, if in their judgment the health, comfort, convenience, or prosperity of the city requires it, may order a turnpike coming into a city to be graded and paved at the expense of the owners of lots fronting upon it. In the case of *Livingston v. The Mayor, &c.*, 8 Wend. 85, the Chancellor used this language:—"It is a well settled principle, that where any particular county, district, or neighborhood is exclusively benefitted by a public improvement, the inhabitants of that district may be taxed

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for the whole expense of the improvement, and in proportion to the supposed benefit received by each."

An act of the legislature of Pennsylvania authorized viewers to take into consideration the advantages of laying out a highway to land owners, and to assess the property benefited for the benefit of other property injured.

In *Nichols v. Bridgeport*, 23 Conn. 189, it is said by HINMAN, J., "most of our highways are laid out by the selectmen of the towns, and the expense is borne by the town in which the highway is located, though in regard to many of them, the inhabitants of the towns have a much less interest than the public beyond the local limits of the town. * * * But the towns bear the burden, because the legislature has thrown it upon them. It might, with the same propriety, have thrown it upon the counties, or even upon the lesser territorial corporations." He holds that although there may be occasional hardships, yet no more equitable system has been devised, and is of opinion that these principles are deducible from the acknowledged right of the public, in taking land for a highway, to consider the benefit accruing to the owner as a set-off to his claim for compensation in whole or in part.

In Mississippi a statute in regard to levees on the river authorized a uniform tax, not exceeding ten cents per acre, upon all lands lying on or within ten miles of the river. The law was sustained. *Williams v. Cummack*, 27 Miss. 209.

There are other authorities to which we might refer, but we regard the precedents in such full accord with the reason of the rule that we do not consider the subject as requiring any further discussion.

That the law is not special or local was determined in effect in *Palmer v. Stumph, supra*.

That a toll is exacted, to maintain the expenses of the highway and to render it a free public road in time, does not render the law invalid. In *Chagrin Falls, &c. Plank Road Co. v. Cane*, 2 Ohio St. 419, the highway was taken by the

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corporation without compensation to the owners of the fee, and the public easement in the land is said to be acquired for a definite purpose, and the use by the plank road company is held to be the same, the difference being only in the mode of levying the tax for construction and keeping in repair. Such is the general doctrine as to turnpike companies. Angell on Highways, § 91 a.

The judgment must be affirmed, with costs.

FRAZER, J., dissents.

C. E. Walker, McDonald, Roache & McDonald, Perkins & Jordan, R. B. & J. S. Duncan, N. B. Taylor, Gavin & Gryden, Claypool & Matsons, and J. Morrison, for appellants.

Hendricks, Hord & Hendricks, Allison & Freidly, and Harrington & Korbly, for appellee.

THE LAFAYETTE AND INDIANAPOLIS RAILROAD CO. AND THE INDIANAPOLIS AND CINCINNATI RAILROAD CO. v. EHMAN.

GENERAL DENIAL.—Burden of Proof.—An answer of general denial throws upon the plaintiff the burden of proving every material allegation of his complaint.

PRINCIPAL AND AGENT.—Admissions.—Evidence.—The declarations or admissions of an agent are evidence against his principal, only when they are made as to a business matter within the scope of his agency, and which is being transacted at the time.

RAILROADS.—Injury to Animals.—Jurisdiction.—A cow and heifer, together worth \$110, standing at the same time a few feet apart upon a railroad track, were killed by a passing train. The value of the heifer did not exceed \$50.

Held, that they constituted one cause of action, of which the Common Pleas Court had jurisdiction.

APPEAL from the Marion Common Pleas.

ELLIOTT, J.—Suit by Ehman against the Lafayette and Indianapolis Railroad Company, and the Indianapolis and

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Cincinnati Railroad Company, to recover the value of a cow and young heifer, alleged to have been killed on the railroad track of the first named company, by a train of cars run upon and over the same by the company last named. It is alleged in the complaint that the Lafayette and Indianapolis Railroad Company had leased its railroad track and appurtenances to the Indianapolis and Cincinnati Railroad Company; that the latter company, while operating said road, and running a locomotive and train of cars over the same, ran over and killed said cow and heifer. The track of said road, at the place where said cow and heifer went upon the same, and where they were so run over and killed, not being securely fenced.

A separate answer was filed by each of the companies, in denial of the complaint. By agreement of the parties, the cause was tried by the court without a jury. The court found for the plaintiff, and assessed his damages at one hundred and ten dollars.

Separate motions for a new trial were thereupon made by each of the defendants, which were overruled, and judgment rendered on the finding.

The questions presented are: 1. The finding of the court is contrary to the evidence. 2. The court erred in admitting irrelevant and incompetent evidence to be given by Charles P. Jacobs. 3. The damages assessed are excessive. The errors are jointly and severally assigned.

The objection urged to the sufficiency of the evidence to sustain the finding against the Indianapolis and Cincinnati company is, that while it shows that the cattle were killed on the road track of the Lafayette and Indianapolis company, it does not show that the former company had leased the road of the latter, or that the cattle were killed by a train of the former, as alleged in the complaint.

The evidence in the case is as follows:—Ehman, the plaintiff below, testified: “I live five and a half miles northwest of Indianapolis, on the Lafayette and Indianapolis

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Railroad. I had two cattle killed on the railroad track, on the 29th of April, 1867, at five o'clock in the afternoon. I was ploughing in the field, and heard the alarm whistle. I went to the place, and saw the cattle. One was a milk cow, worth eighty-five dollars; the other was a heifer, worth thirty-five dollars. Where the animals were killed the fence was good, but at other places, where the animals could enter upon the track, the fence was down—in some places for several panels—and had been in this condition for several years. There was no road crossing where the animals were killed. The stock was, at the time, running at large on Mrs. Andrew Bridgeford's farm. It was a passenger train, running in the direction of Indianapolis. The cattle seemed to be struck a few feet apart, I cannot say how many. The road was straight there. I could see the locomotive a mile or a mile and a half. The cattle lay there for a day or so, and then the railroad sent men and took them away. I never got them afterwards, and have not been paid for them."

Laura F. Bridgeford testified for the appellee:—"Live six miles from Indianapolis, near the Lafayette and Indianapolis Railroad. The cattle of the plaintiff were killed by a passenger train, right below our house, at five o'clock in the afternoon. I heard the alarm whistle. There were three cows on the track; one got off. The cow and heifer were struck by the cow-catcher of the locomotive; one was thrown on one, and the other on the other side of the track. The railroad men afterwards came and took the cattle away that were struck. The fence was not good; it was down in places. The third cow, that was not struck, was the plaintiff's. The cows and heifer were grazing on the track, facing Indianapolis. I saw them when they were struck by the locomotive. Both were not struck at once. I can't say which was struck first, but think they were struck three or four feet apart. The cow was lying nearer Indianapolis than the heifer."

John Cole testified for appellee:—"The plaintiff had a cow and heifer killed on the track of the Lafayette and

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Indianapolis railroad. I saw them after they were killed. The cow was worth eighty dollars, any how; the heifer, thirty dollars. The railroad fence was down in many places."

Charles P. Jacobs testified for plaintiff:—Called on W. H. L. Noble, General Agent of the Indianapolis and Cincinnati Railroad Company, and stated the circumstances of Mr. Ehman's cattle being killed on the Lafayette railroad track, giving him time and place. He admitted the killing of the cattle by the train; he called it our road, at least. He said he would give us fifty dollars to settle it. He told me then, or on a subsequent visit, that Mr. Richardson, the superintendent of the Indianapolis and Cincinnati Railroad Company, had charge of settling all these matters, and would be up in a day or two, and asked what I would take. I stated the terms, and he refused to give it."

The evidence does not sustain the finding against the Indianapolis and Cincinnati Railroad Company.

The answer was a general denial, which threw on the plaintiff the burden of proving every material allegation of the complaint. There was no evidence that that company had leased the road of the Lafayette and Indianapolis company, or that it was operating or running trains on that road, as alleged in the complaint. The only evidence relied upon to charge the Indianapolis and Cincinnati company is that of Charles P. Jacobs, as to what occurred in an interview had by him with W. H. L. Noble. The declarations or admissions of an agent are evidence against his principle, only when they are made as to a business matter within the scope of his agency, and which is being transacted at the time. *Hynds v. Hays*, 25 Ind. 34.

It does not appear from the evidence that making such settlements was within the scope of the power conferred on Mr. Noble. On the contrary, he informed Mr. Jacobs, at the time of the interview, that Mr. Richardson, the superintendent of the company, had charge of settling all such matters. But if the statements of Mr. Noble were evi-

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dence, they only admit that the cattle were killed by a train on the Lafayette railroad track, which Mr. Noble spoke of as "our road." It does not prove that the cattle were killed by a train belonging to, or in the charge of, the Indianapolis and Cincinnati Railroad Company.

There is no foundation for the objection that the damages are excessive. The finding is for the lowest amount fixed as the value of the property by any of the witnesses. But it is contended by the appellants' counsel that the cow and heifer were not both killed at the same time, and as the value of the heifer did not exceed fifty dollars, the Common Pleas Court had no jurisdiction of that part of the case, and should, therefore, have found for the plaintiff the value of the cow only. The evidence shows that the cow and heifer were standing on the track, not over four feet apart, and were killed by the same train. They were killed so near the same instant of time that the intervening period is inappreciable, and under such circumstances we fail to appreciate the objection.

The judgment is reversed as to the Indianapolis and Cincinnati Railroad Company, with costs, and affirmed, with costs, as to the Lafayette and Indianapolis Railroad Company.

T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellants.

L. Barbour and C. P. Jacobs, for appellee.

BOARD OF COMMISSIONERS OF CLINTON COUNTY *v.* McDOWELL.

RELIEF OF SOLDIERS' FAMILIES.—Statute.—Construction of.—The provision of the third section of the act of December 20th, 1865, that disbursements from the fund for the relief of soldiers' families should cease after the 3d of March, 1866, has relation to the time for which such disbursements should be made, and does not prohibit payment after that date to those entitled for time prior thereto.

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SAME.—Application for.—Since the 4th of March, 1866, an application for payment from such fund is properly made directly to the Board of County Commissioners, whose determination of the question whether the applicant had otherwise sufficient means for comfortable support is final.

APPEAL from the Clinton Circuit Court.

ELLIOTT, J.—McDowell presented a claim to the Board of Commissioners of Clinton county, at the March term thereof, 1868, for the sum of sixty dollars, under the act for the relief of families of soldiers, &c., approved March 4th, 1865. The board refused to allow the claim, and McDowell appealed to the Circuit Court, where the statement of the claim was amended so as to present the following facts: That in the year 1865, there was levied and collected in Clinton county, under the act of March 4th, 1865, for the relief of soldiers' families, &c., the sum of \$16,473.84; of which, the sum of \$1,529.68 was applied under the provisions of the act for the relief of soldiers' families, leaving the sum of \$14,944.16 of said fund in the county treasury; that McDowell was mustered into the military service of the United States as a private in Co. "M," 126th Reg't (11th Cavalry) of Indiana Volunteers, on the 30th of January, 1864, and that he continued in said service until the 6th day of June, 1865; that he was not a commissioned officer during any part of his term of service; that he had during the time, and now has, a wife and five children—the children being under the age of twelve years—who were dependent on him for support, and had not otherwise sufficient means for their comfortable support; that during said period they were, and still are, residents of Perry township, in said county, and were duly enumerated in the enumeration taken in said township under the provisions of said act, but were never paid anything thereunder.

A demurrer to the claim having been overruled, a general denial thereof was filed, and the case submitted to the court for trial. On the trial the attorney for the board of commissioners admitted "all the facts alleged by the plaintiff

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in his complaint to be true;" and the court thereupon found for the plaintiff the sum of sixty dollars, and, having overruled a motion for a new trial, rendered judgment for that sum.

The question presented here is, was the plaintiff entitled to the allowance, under the facts presented in the claim? The act of March 4th, 1865 (Acts Reg. Sess. p. 93), created a special fund for the relief of the families of soldiers in the service of the United States, from this State, and provided for its payment to the trustees of the several townships to "be distributed by them for the relief of the families of non-commissioned officers, musicians, and privates, in the service aforesaid, who have not otherwise sufficient means for their comfortable support, such fact to be determined by the disbursing officer; but any applicant dissatisfied with his decision may refer the same to the Board of County Commissioners, whose determination shall be final, as follows: To the wife or mother dependent on said soldier, the sum of eight dollars per month; and to each child under the age of twelve years, the sum of two dollars per month," &c.

This act was repealed by the first section of the act of December 20th, 1865 (Acts Spec. Sess. p. 59). But the second section of the repealing act provides that "The taxes levied in pursuance of the provisions of the above entitled act, for the year 1865, shall be collected and retained in the several counties where the same was levied, under the control of the Board of County Commissioners, and by them applied in conformity with said act, as if the same were still in force, subject to the provisions herein recited." The third section declares that "On and after the third day of March, 1866, all disbursements from such funds to the persons, in said act enumerated, shall cease;" and provides that the residue of the funds collected for the year 1865, after the payment of all loans that may have been made by the county under the provisions of the act of March 4th, shall be retained in the county treasury, and

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makes it the duty of the board of commissioners in their discretion to provide therefrom in a liberal manner, amongst others, for the wives, children, and mothers, dependent on such soldiers, &c.

It is argued on behalf of the appellants, that no claim could be presented for an allowance under the original act for the year 1865, after the third day of March, 1866, as the third section of the repealing act declares that all disbursements from the fund shall cease after that date.

We held in the case of *The Board of Commissioners of Floyd County v. Love*, 28 Ind. 198, that persons coming within the provisions of the seventh section of the act of the 4th of March, 1865, were entitled to the allowance therein provided, as a right, and that the payment thereof was not a matter of discretion, but of duty. The obligation imposed by the original act to make the payments monthly for the year 1865, is expressly recognized and required by the repealing act. The provision of the third section of the repealing act that all disbursements from the fund should cease after the 3d day of March, 1866, when construed with the other provisions of the act, we think, has relation to the time for which such payments should be made, and does not prohibit payments after that date to those entitled for any period of time prior thereto. The original act was approved on the 4th of March, 1865, and extended the relief to the families of soldiers coming within its provisions, for the period of two years, to wit, for the years 1865 and 1866, and directed a special levy for each of those years, to defray the expenses thereof. The levy was made for the year 1865, and the special object of the repealing act seems to have been to prohibit the levy for 1866, and limit the period of the provision to one year from the passage of the original act. This construction is sustained by the fifth section, which declares that nothing in the act shall be so construed as to prevent the board of commissioners from allowing to the families of soldiers the amount to which they were entitled by the act repealed, for

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the year 1865, in all cases where the same has not been allowed.

The act provided for monthly payments, and was evidently intended as a present aid in the support of such families as were dependent on absent soldiers, during the period of their absence in the military service. Its provisions however were not extended to the families of all the soldiers from the State, but only to such as were dependent on soldiers, and "who had not otherwise sufficient means for their comfortable support," which fact was to be determined by the disbursing officer; but if the applicant was not satisfied with the decision, he might refer the question to the board of county commissioners, whose determination was final. Since the 4th of March, 1866, the application is properly made, under the repealing act, directly to the county commissioners.

It is but reasonable to suppose that the necessities of those entitled to share in the fund would have induced them to apply promptly for the amount allowed, as it became payable, and a failure to make such application, and especially after a lapse of over two years, might afford a reasonable presumption, in the absence of explanatory facts, that the applicant had other means for a comfortable support. If, in this case, the application had been rejected by the board of commissioners for that reason, the decision would have been final, from which there would have been no appeal. But the claim was not denied on that ground; and it was admitted by the commissioners, in the Circuit Court, that the family of McDowell, during the period for which the claim is made, were dependent on him, and had not otherwise sufficient means for their comfortable support. We think, therefore, that the Circuit Court committed no error in making the allowance, and hence, that the judgment must be affirmed.

Judgment affirmed, with one per cent damages, and costs.

L. McClurg and J. N. Sims, for appellant.

S. H. Doyal and P. W. Gard, for appellee.

Shane v. Francis.

SHANE v. FRANCIS.

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BONDS.—*Official.—Surety*—A surety upon an official bond, as well as his principal, is a debtor, within the meaning of the statute which provides that “judgments on bonds payable to the State of Indiana, shall bind the real estate of the debtor from the commencement of the action.” (2 G. & H. 233, sec. 414.)

SAME.—*Payable to State.—Relator*.—No relator is necessary in an action by the State on a bond payable to her, when the obligation is to the State, and no individual has an interest therein other than that common to all.

APPEAL from the Ripley Circuit Court.

GREGORY, J.—Shane brought his action against Francis for the purpose of “determining and quieting the question of title.”

The State, on the relation of the appellee, commenced an action in the Court of Common Pleas of Ripley county, against the sheriff and the sureties upon his official bond, to recover money collected by him as such sheriff, upon executions in his hands. Bagot was one of the sureties, and a defendant to the action, and, at the commencement of the suit, owned the land in question. After suit, but before judgment, Bagot, for a valuable consideration, conveyed the land to one William Bagot, in good faith, who afterwards, in good faith, and for a valuable consideration, conveyed it to the appellant. After Bagot, the surety, conveyed the land, judgment was rendered in the action against the sheriff and his sureties, upon which execution was issued and the land levied upon and sold, and the appellee became the purchaser.

The court below, on a demurrer to the complaint, held that the judgment bound the real estate of the surety from the commencement of the action. This ruling presents the question in the case. The code provides that “judgments on bonds payable to the State of Indiana, shall bind the real estate of the debtor from the commencement of the action.” 2 G. & H. 233, sec. 414.

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Was the surety a debtor, within the meaning of the statute? HUBBARD, J., in *Gray v. Bennett*, 3 Met. 522, says: "The word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations arising under simple contract, to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise. And long ago it was held, as expressed by BLACKSTONE, that 'whatever the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge.'"

The surety was jointly liable with his principal, by contract, for the money collected and not paid over by the latter. The default of the sheriff fixed the liability of the surety, and the obligation to pay became a "debt" against him, as well as against his principal.

All official bonds are made payable to the State. 1 G. & H. 164. It is contended, that only bonds payable to the State for obligations to her are embraced by the code. We think otherwise. It is true that section 7 provides that "actions upon official bonds, and bonds payable to the State, shall be brought in the name of the State of Indiana, upon the relation of the party interested." 2 G. & H. 41. That section, it will be observed, however, provides for a relator in all actions on bonds embraced in it. Now, it cannot be contended with any plausibility that a relator is necessary in an action by the State on a bond payable to her, when the obligation is to her, and no individual has an interest therein other than that common to all. The code itself contains evidence that when the legislature intended therein to make a distinction between the principal and surety the latter is named: it is provided that "every recognizance shall bind the real estate of the principal from the time it is taken; but shall only bind the real estate of the surety from the time judgment of forfeiture is rendered." 2 G. & H. 265, sec. 531. The court below com-

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mitted no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

H. W. Harrington, for appellant.

L. Howland, for appellee.

COLE v. McMICKLE, Administrator.

MORTGAGE.—*Decedents' Estates.—Administrator.*—An administrator is presumed to be cognizant of mortgages executed by the decedent in his lifetime upon his real and personal property, and they are not barred by a failure to file a statement of them within the time limited for the filing of claims by section 62 of the "act providing for the settlement of decedents' estates," &c. (2 G. & H. 501), being expressly excepted therein.

SAME.—*Residue after Foreclosure.*—After foreclosure, by proceeding *in rem*, and sale of land mortgaged by a decedent in his lifetime to secure his promissory note, the residue of the debt does not cease to be a mortgage debt within the meaning of the exception in that section, and payment thereof may be claimed out of the other assets of the estate.

APPEAL from the Harrison Common Pleas.

ELLIOTT, J.—The record in this case presents the following state of facts:—On the 3d of July, 1866, William Carson, since deceased, executed to Cole, the appellant, two promissory notes for six hundred dollars each; one payable on the 20th of March, 1867, and the other on the 20th of March, 1868; and, to secure the payment thereof, Carson and his wife, on the 7th of July, 1866, executed to Cole a mortgage on a tract of land in Harrison county. On the 1st day of April, 1867, Carson died at said county, intestate, leaving personal estate to an amount exceeding twelve hundred dollars, to be administered; and afterwards, on the 19th of April, 1867, letters of administration on the estate of Carson were duly granted by the clerk of the Court of Common Pleas of Harrison county to the appellee, Mc-

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Mickle, who took upon himself the administration of the estate. On his refusal to pay the first of said notes, which had become due, on the 23d of November, 1867, Cole commenced a suit in said Court of Common Pleas for the foreclosure of the mortgage, in which the widow and heirs of Carson, and also McMickle, his administrator, were made defendants; and at the December term, 1867, of the court, a decree of foreclosure was rendered, and the mortgaged land directed to be sold for the payment of the notes. A copy of the decree and order of sale was issued, and on the 9th of May, 1868, the land was sold thereon by the sheriff for eight hundred dollars, Cole becoming the purchaser. The costs of the suit and sale, which Cole paid, amounted to \$68.70, leaving \$731.30 to be credited on the decree.

On the 11th of August, 1868, Cole filed a claim for the balance remaining due on the notes, then amounting to \$582.30, in the clerk's office of said court, which was sworn to, and entered on the appearance docket of the court. On the 3d day of the August term of the court, 1868, which term commenced on the 24th day of that month, the record shows the following proceedings:

"In the matter of the estate of William Carson, deceased. Comes now John H. McMickle, administrator of said estate, into open court, and suggests to the court that he is now ready to finally settle said estate, unless he is compelled to pay the claim of Joseph Cole, filed in the clerk's office on the 12th day of August, 1868, for \$582.30, and asking the court for directions as to the payment of the same; and the court being sufficiently advised finds that said claim was not filed within one year from the granting of administration and notice, and that said claim was not filed thirty days before final settlement, and thereupon directs said administrator to pay all other claims and proceed to make his final settlement without the settlement of said Cole's claim," which the court refused to allow "and rejected the same from allowance in the final settlement of said administra-

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tion." Cole thereupon moved the court for a new trial, for the reasons that the finding of the court was contrary to the law and the evidence in the case, but the motion was overruled, the final settlement made; and the administrator discharged. To all of which rulings the appellant excepted. The record further shows that after paying all other claims against the estate, the expenses of administration, and three hundred dollars to the widow, there remained in the hands of the administrator the sum of \$344.34.

It is contended by the appellee that the rulings of the court complained of are in accordance with section 62 of the act relating to the settlement of decedent's estates, &c. (2 G. & H. 501). That section reads as follows:—"A succinct statement of the nature and amount of every claim, whether due or not, against the estate of any decedent, except judgments which are liens upon the decedent's real estate, and mortgages of his real or personal estate obtained and executed in his lifetime, and expenses of administration, must be filed in the office of the clerk of the proper court of common pleas, within one year from the date of the first appointment of an executor or administrator therein, and notice thereof; or no cost shall be recovered therein against such executor or administrator; nor shall hereafter any other court have original jurisdiction of any claim, except such liens against the estate of any decedent; and, if such claim be not due, interest thereon shall be rebated, and after the expiration of one year from such appointment and notice, if such claim be not filed at least thirty days before final settlement of the estate, it shall be barred, except as hereinafter provided in case of the liabilities of heirs and devisees."

This section does not sustain the court in holding that the claim of Cole was barred because it was not filed within one year after the grant of administration and notice, nor for thirty days before the time of final settlement.

The notes were secured by mortgage executed by the decedent in his lifetime on his real estate, and were there-

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fore excluded from the operation of the provisions of the section by its own express terms. The exception is in harmony with section 109 of the same act, which, in directing the order of payment of the claims against the estate of a decedent, requires that judgments which are liens upon the decedent's real estate, and mortgages of real and personal property existing in his lifetime, shall be paid next after the expenses of administration, of the last sickness, and of the funeral.

The administrator is presumed to be cognizant of mortgages executed by the decedent in his lifetime upon his real and personal property, and they are not barred by a failure to file a statement of them within the time limited by section 62. Such claims do not come within the purview of that section, and cannot be affected by it. But it is argued that after the mortgage was foreclosed and the land sold, the residue of the debt remaining unpaid ceased to be a mortgage debt within the meaning of the exception, and was, therefore, subject to the provisions of that section; and such seems to have been the view taken of it by the court below. We cannot admit the correctness of the position. Such a construction would violate both the letter and spirit of the statute, and could only be productive of injustice and wrong.

It is also insisted by the counsel for the appellee, that the appellant, in foreclosing the mortgage, if he was not willing to rely on the sufficiency of the land mortgaged for the payment of the entire debt, should have taken a judgment over against the administrator for any balance that might remain unpaid after the sale of the land mortgaged, and having failed to do so, he is barred from setting up any claim for such residue against the administrator. The administrator was not a necessary party to the foreclosure suit, though he was made such. The suit to foreclose the mortgage was a proceeding *in rem*; it simply sought to subject the mortgaged land to sale for the payment of the debt se-

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cured thereby. The widow and heirs of Carson were the only necessary parties defendant, and Cole was not entitled to a personal judgment against them; nor was he entitled to a personal judgment against the administrator for any balance that might remain after the land mortgaged was exhausted, if for no other reason, because that suit was commenced and the final decree rendered long before the expiration of a year from the grant of letters of administration. We are unable to see anything in the decree in the foreclosure suit to preclude the appellant from claiming the payment of the residue of his debt out of the other assets of the estate. The rulings of the Common Pleas, in rejecting the claim and ordering a final settlement of the estate, were clearly erroneous, and must therefore be reversed.

The final order of the court, in rejecting the appellant's claim and in requiring the estate to be finally settled, as well as the final settlement thereof made under said order of the court, is reversed and set aside, and the cause remanded for further proceedings in accordance with this opinion.

W. A. Porter, for appellant.

S. K. Wolfe, for appellee.

WATTS v. GREEN and Another.

PRACTICE.—*Motion for Judgment on Verdict.—Waiver.*—Where a new trial was granted to the plaintiff upon the payment of costs within a prescribed period, and, without sufficient excuse for the failure, such costs were not all paid in the time allotted; it was held, that the defendant did not waive his right to judgment on the verdict by consenting to continuances and issuing a subpoena after the expiration of such period, believing the costs had been paid.

SAME.—*Replevin.—Judgment.*—General verdict for the defendant in replevin

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and judgment thereon for the return of the property. No exception was taken to the nature of the judgment.

Held, that an objection to the judgment, on the ground that the verdict did not find the value of the property, could not be raised in this court.

SAME—Supreme Court.—The general rule is, that a question must have been raised below before it can be presented in the Supreme Court.

APPEAL from the Ohio Circuit Court.

FRAZER, J.—This was an action of replevin by the appellant against the appellees. Issues were formed, upon trial of which a general verdict for the defendants was returned. A new trial was thereupon granted to the plaintiff, upon the payment of costs in sixty days. This was at the August term, 1862. At the next term, and at each succeeding term until that of February, 1866, the cause was continued by agreement. At the last mentioned term, the defendants moved for judgment on the verdict, it appearing that the costs had not been paid. This motion was sustained, and the plaintiff excepted. Judgment was thereupon entered for the return of the property, and there was no exception thereto. Affidavits and evidence submitted on both sides, upon the hearing of the motion for judgment, disclosed nothing to excuse the non-payment of costs within the sixty days limited by the court. A mistake was first made by the clerk in stating the amount of costs to the plaintiff. The amount thus erroneously given was paid within the time. But notice of the error was given in time to have enabled the plaintiff to pay the balance within the sixty days, and he neglected to pay it, though it was paid after the motion was entered. The defendants consented to the various continuances, supposing that the costs had been paid, and had issued a subpoena for witnesses, returnable to the February term, 1866.

The appellant contends that the appellees, by consenting to the continuances and issuing the subpoena, waived their right to demand judgment upon the verdict. We are unable to concur in that opinion. There is no similarity between the case in hand and one where a discontinuance

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has been suffered. In that case a subsequent appearance waives the discontinuance. A discontinuance does not entitle the defendant to final judgment on the merits, like a verdict, but the plaintiff may bring a new suit; and a voluntary appearance would be a waiver of process, or of defects in the process. A discontinuance is a thing to be insisted upon, or no advantage results from it, if there be a subsequent appearance; but if a verdict stands, the court renders judgment of its own motion. It is further objected, that the court erred in rendering judgment for the return of the property, inasmuch as the verdict did not find its value. This question is not in the record, as no objection was made below to the nature of the judgment. The exception reserved was only to the opinion of the court determining that the defendants should have judgment upon the verdict. The general rule is, that a question must have been raised below before it can be presented here.

The judgment is affirmed, with costs.

D. S. Major, for appellant.



McVEY and Others v. HEAVENRIDGE and Others.

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151 74

PRACTICE.—*Location of Highways.—Appeal Bond.*—A bond signed by the appellants only, is not a bond with surety as required by the statute allowing an appeal from the decision of the Board of County Commissioners in a proceeding for the location of a highway (I G. & H. 864, sec. 26); nor can the defect be cured by filing a proper bond in the appellate court.

APPEAL from the Marion Civil Circuit Court.

RAY, C. J.—The appellees commenced proceedings before the Board of Commissioners of Marion county, for the purpose of having a highway located through the grounds

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of the appellants. The Commissioners acted upon the petition, and received a report of viewers, and upon a remonstrance being filed, appointed reviewers, who reported the proposed road to be of public utility, but did not make any allowance for damages to the owners of the land over which the road was located. A petition was thereupon filed, asking such damages to be properly ascertained by new viewers. The petition was rejected. An appeal was prayed from this decision to the Marion Circuit Court, on behalf of the owners of the land, and allowed upon a bond being filed within thirty days, with proper security thereon. Subsequently, an appeal bond was filed, which recited that, "whereas, James McVey, James C. Myers, Jacob Myers, and Lucinda Hines have appealed from the decision of the Board of Commissioners," &c. This bond was signed only by the appellants, and was approved by the auditor, and the papers filed in the Marion Civil Circuit Court, where a motion was made to strike the appeal from the files of the court, for the reason, among others, that no bond with surety as required by law had been filed. The motion was sustained, and to this ruling the appellants object.

The statute provides that the appeal shall be, upon the person aggrieved "filing a bond, with surety and penalty, to be approved by the auditor of such county." 1 G. & H. 364, sec. 26. A bond without a surety does not, therefore, work an appeal. We cannot extend the language of the statute. Nor could the Circuit Court grant an appeal upon a proper bond being filed in that court. Where the law had been complied with, and a bond with surety and penalty filed, to the approval of the auditor, it may be that the Circuit Court might require additional and sufficient security; but this question is not before us for decision.

The judgment is affirmed, with costs.

W. Wallace, for appellants.

R. B. & J. S. Duncan, for appellees.

Wishmier v. Behymer.

30	109
142	321
30	109
148	186

WISHMIER v. BEHYMER.

NEW TRIAL.—Excessive Damages.—The Supreme Court will not reverse a judgment for the purpose of granting a new trial on the ground of excessive damages, where the verdict is within the range of the evidence. **SAME.—Admission of Evidence.—Error Cured.**—The error of admitting improper evidence over objection is cured by the instruction of the court to the jury to disregard such evidence.

APPEAL from the Marion Civil Circuit Court.

GREGORY, J.—Behymer sued Wishmier in the court below for a failure by the latter to deliver to the former, at Indianapolis, a certain amount of walnut lumber, on contract. There are two paragraphs of the complaint, one of which alleges special damages. Trial by jury; finding for the plaintiff, assessing the damages at \$329.78. A motion for a new trial was overruled. The only error relied on in this court is, that the court erred in overruling the motion for a new trial.

The first point made is, that the damages are excessive. The proof tends to show that there was a failure to deliver some eighty-two thousand feet of lumber. The contract price was twenty-six dollars per thousand. There was a conflict in the evidence as to the value of the lumber at the time and place of delivery. The jury were the sole judges of the credit to be given to the witnesses. The verdict is within the range of the evidence, and this court cannot interfere with the finding.

The plaintiff, on the trial, over the objection of the defendant, was permitted to testify as to the value of such lumber at the time of delivery in the New York market, for the purpose of sustaining the allegation of special damages. The jury were instructed by the court to disregard this evidence, the plaintiff having, on the trial, abandoned his claim for special damages. If there was any error in admitting this proof, it was cured by the instructions of the court. The testimony admitted, under the charge of the court, could not have prejudiced the defendant's case.

Noakes and Others v. Morey and Another.

The judgment is affirmed, with costs and ten per cent. damages.

J. S. Harvey, for appellant.

A. G. Porter, B. Harrison, and *W. P. Fishback*, for appellee.

NOAKES and Others v. MOREY and Another.

VERDICT.—Special Finding.—Interrogatories.—An interrogatory propounded to a jury for the purpose of obtaining a special finding upon a particular question of fact, which presents alternative and antagonistic propositions, in such form that an affirmative answer to one excludes the truth of the other, is not double, so as to require a separate answer to each branch of it.

SAME.—Defective Special Finding.—If a special finding be equivocal, or not fully responsive to the interrogatory, either party may demand that the verdict be not received, and that the jury be kept together and directed to answer fully; but after the verdict has been received without objection, and the jury discharged, it is error to strike from the record such special finding, pertinent to the case, and render judgment on the residue of the finding.

CONTRACT—Sale of Goods.—Earnest.—Part Payment.—The parties to a contract for the sale of goods to be delivered at a future time, the price of which was more than fifty dollars, each delivered to the agent of both a check payable to said agent, as a forfeiture; the money, on failure of either party, to be paid over by the agent to the other.

Held, that nothing was given in earnest to bind the bargain, or in part payment for the goods.

SAME.—Memorandum.—A memorandum made by the agent of both parties and signed by him in his own name, in the absence of the parties, not by their agreement, but at his own instance and for his own use and convenience, was not sufficient to take the case out of the statute of frauds.

APPEAL from the Tippecanoe Civil Circuit Court.

ELLIOTT, J.—This was a suit by Morey and Godman against Noakes, Graves, and Snyder, to recover damages for a breach of contract. The complaint was in two paragraphs, founded on separate contracts. On the first the appellees recovered a judgment, but the appellants, the de-

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fendants below, had judgment on the second, and hence no question is presented by them on that paragraph.

It is alleged in the first paragraph, that on the 29th day of May, 1867, the plaintiffs, who were partners in buying and selling grain, bargained and sold to the defendants six thousand bushels of number one corn, for one dollar and eight cents per bushel, to be delivered on the first day of the ensuing July, at Toledo, in the State of Ohio, in store, in care of Young and Backus; that at the time of the sale "the plaintiffs and defendants mutually agreed and appointed one Consider Tinkler as their mutual agent to make a memorandum of said bargain and sale, and sign the same in his own name in behalf of said plaintiffs and defendants;" that Tinkler thereupon made such memorandum, using therein the name of "Stokes" for "Noakes," which is as follows, viz:—"May 29, '67. Morey sells Nate Stokes 6,000 bushels corn in store at Toledo, Ohio, at 108c per bushel, to be No. 1, and delivered July 1st, 1867, care Young & Buckus.

C. TINKLER."

That contemporaneously with the making of the sale and memorandum thereof, the defendants delivered to Tinkler in part payment to bind the contract, a check drawn by said Noakes on funds in the Union National Bank, in the county of Tippecanoe, Indiana, to be held by him for the use of the plaintiffs; that the defendants afterwards, and before the 1st of July, 1867, "stopped the payment of said check, and that the same, although of value when drawn, was afterwards rendered valueless by the act of said defendants;" that on the 1st day of July, 1867, the plaintiffs were in Toledo, Ohio, ready and willing to deliver said corn, and then and there tendered and offered to deliver the same to Young and Backus, as required by said contract, but they refused to receive it; that such corn was only worth seventy cents per bushel at Toledo, Ohio, on the 1st day of July, 1867; that by the custom of grain dealers at Toledo, of which the defendants had notice, they became liable to the plaintiffs for the difference between the contract price

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of the corn and the market value thereof at the time and place of delivery, &c.

The defendants answered by a general denial, and by a special paragraph setting up a counter claim, but as no question is presented in this court upon the latter, it need not be further noticed. The jury returned a general verdict for the plaintiffs, and assessed their damages on the first paragraph of the complaint at six hundred dollars. Special findings upon particular questions of fact, in answer to interrogatories propounded at the request of each of the parties, were also returned. The interrogatories propounded at the plaintiffs' instance and the answers thereto, so far as they related to the issues on the first paragraph of the complaint, are as follows:

“1. Who drew the check delivered to Tinkler, in the first paragraph mentioned, if one was delivered?”—“Noakes.”

“3. Were the checks, or either of them, and if only one, which, mentioned in the first interrogatory, drawn on the joint funds of all the defendants, or on the funds of the defendant Noakes?”—“On the joint funds of the defendants.”

“4. Did the plaintiffs know that the check, in the first paragraph of the complaint mentioned, was drawn on the joint funds of all the defendants, at the date of the contract, if any was so drawn?”—“No.”

“6. Was not the memorandum made by C. Tinkler, made by the agreement of the parties?”—“No.”

“7. Was not the \$600 check of said Noakes delivered to said Tinkler as margin, or payment, on said 6,000 bushel contract?”—“No.”

“9. Were not Young and Backus the agents of the defendants at Toledo, Ohio?”—“Yes.”

“10. Were not said agents acquainted with the custom of grain dealers at Toledo, Ohio, on and prior to the 1st July, 1867?”—“Yes.”

“11. Did not the plaintiffs tender said 6,000 bushels *** of corn, of the quality mentioned in said contract, on the

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1st of July, 1867, to Young and Backus, defendants' agents at Toledo, Ohio, according to the custom of grain dealers?"—“Yes.”

The interrogatories propounded at the request of the appellants, with their answers, are as follows:

“1. Did Consider Tinkler, at the time of the alleged sale by the plaintiffs to the defendants of 6,000 bushels of corn, to be delivered in Toledo, Ohio, on the 1st day of July, 1867, make a memorandum in writing of said sale?”—“Yes.”

“2. Did said Tinkler sign said memorandum, in his own name by the style of C. Tinkler, at the time of making said sale, and in the presence of the parties thereto; or did he sign it afterwards at his own office and in their absence?”—“At his own office and in their absence.”

“3. Did said Tinkler make said memorandum by the authority of the defendants, for the purpose of binding them and the plaintiffs; or did he make it for his own use and convenience?”—“For his own use and convenience.”

“4. Did the defendants authorize said Tinkler to sign said memorandum for them by his own name; or did he sign it at his own instance?”—“At his own instance.”

“5. Did the plaintiffs, at the time of making said alleged contract for the sale of 6,000 bushels of corn, deliver to said Tinkler their check, payable to him in the sum of \$600; and did the defendants at the same time also deliver to said Tinkler their check payable to him in the like sum of \$600?”—“Yes.”

“6. Was it not intended by the plaintiffs and defendants, at the time they delivered said checks to said Tinkler (if you find that such checks were delivered), that, in case either party should fail to perform said contract, the money should be paid over by said Tinkler to the other party?”—“Yes.”

“7. Has payment been made, either in whole or in part, on either one of said checks?”—“No.”

“8. Was the price of said 6,000 bushels of corn in said alleged contract more than fifty dollars?”—“Yes.”

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"9. Was any part of said 6,000 bushels of corn ever received by the defendants?"—"No."

"10. Was anything ever given or delivered by the defendants to the plaintiffs or their agent, on said sale of 6,000 bushels of corn, other than the said check given by the defendants to Tinkler?"—"No."

"20. Did the plaintiffs on the 1st day of July, 1867, tender to the defendants or their agents at Toledo, Ohio, any actual corn, or did they tender only written obligations on third persons calling for corn?"—"Obligations on third persons only."

"21. Were the checks of Noakes, the one for \$600 and the other for \$500, given respectively in the character of purchaser of corn, as alleged in the complaint?"—" \$600 as forfeiture, \$500 as purchaser."

The appellants thereupon moved the court for judgment in their favor on the special findings of the jury, over and notwithstanding the general verdict for the plaintiffs, which motion the court overruled, and then, on the plaintiffs' motion, struck out the special findings of the jury in answer to interrogatories numbered two, three, and four, propounded at the request of the appellants, and rendered judgment for the plaintiffs for six hundred dollars, on the general verdict. To these several rulings the appellants excepted. The errors assigned are: 1. The court erred in overruling the appellants' motion for judgment in their favor on the special findings of the jury, over, and notwithstanding their general verdict for the plaintiffs. 2. The court erred in striking out the special findings of the jury in answer to interrogatories two, three, and four, submitted to them at the instance of the appellants.

The last assignment will be first considered. The reasons, stated in a bill of exceptions, for the action of the court in striking out the answers returned by the jury to the interrogatories named, are, that said interrogatories "two, three, and four, were double, and that the answers thereto

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did not ascertain the facts as to one branch of each of said questions."

We cannot but regret to be compelled, as we are, to examine these questions without the aid of any argument on the part of the appellees. The amount involved is certainly sufficiently large to interest them in an effort to sustain the judgment of the court below in their favor.

We do not think the second and fourth interrogatories are double, so as to require a separate answer to each branch. Each of these interrogatories contains two distinct and antagonistic propositions, presented in the alternative, both of which could not be true, one of which is in accordance with the claim of the appellees, the other in opposition to it. Both are presented in an affirmative form, so that an affirmative answer to one excludes the truth of the other. Take the fourth as an illustration. "Did the defendants authorize Tinkler to sign said memorandum for them by his own name" (it is alleged in the complaint that they did so authorize him); "or did he sign it at his own instance?" The answer is, "At his own instance." The plain meaning of the answer is, that Tinkler signed the memorandum as his own voluntary act, and not by authority of the appellants, and was a full answer to the whole interrogatory. These remarks apply with equal force to the third interrogatory and answer. It is possible that a construction may be given to the second interrogatory, by which it would present two separate questions, but we think it a fair construction of its language, to say that it, like the third and fourth, only presents alternative propositions. The jury, in answer to the first interrogatory of the appellants, found that Tinkler, at the time of the sale, made a written memorandum of it, and there seems to have been no controversy that his own name only was signed to it. It is so alleged in the complaint. But the real question in controversy was, did he make and sign the memorandum by the authority and as the agent of the defendants below; or, on the contrary, was it a mere voluntary act of his own, and without

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such authority? It is to that question that the second, third, and fourth interrogatories were directed, and by the answers to them it is made clear that the memorandum was not made by Tinkler by the authority of the appellants.

It is said that the interrogatories were deemed double under the authority of the case of *Rosser v. Barnes*, 16 Ind. 502. But there is no analogy between the question in that case and the case under consideration. There the question propounded was, whether one Dodd, on a day named, had transferred to Rosser a large amount of personal property, for the purpose of hindering, delaying, and defrauding his creditors, and if so, whether Rosser was cognizant of such fraud. Such an interrogatory evidently contains two distinct questions, each requiring a separate answer. But if the answers in the case before us were defective because they failed to answer the interrogatories fully, still we think it would be error for the court to strike them from the record after the jury was discharged. We know of no authority for such a practice. It was said by the court in *Rosser v. Barnes*, *supra*, that it is the duty of the court to see that interrogatories, when asked, are properly framed, and presented to the jury, "and that they are definitely and completely answered, or ignored, if such answer is insisted upon, before the finding is accepted. If they are not thus answered, the court cannot give full weight to the answers in deciding the cause."

If, in this case, the answers to the interrogatories were deemed equivocal, or as not being fully responsive to the questions asked, it was the province of either party to demand that the verdict should not be received, and that the jury should be kept together, and directed to answer the questions fully; but after the verdict was received by the court, without objection, and the jury discharged, it was error for the court to strike out one portion of the finding, pertinent to the case, and render judgment on the residue. Imperfect or indefinite special findings in such cases may not be sufficient to control a general verdict, or may,

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in the opinion of the court, in a given case, justify the granting of a new trial; but they form a part of the record, and must be considered, at least for what they are worth, in the determination of the question as to what the judgment should be, or on a motion for a new trial, when the special findings form the basis of such motion, and cannot be got rid of by a motion to strike them from the record.

But whether the judgment should be reversed for this error must depend upon the decision of another question, namely: are the special findings, including the answers to the second, third, and fourth interrogatories of the appellants, so stricken out by the court, so inconsistent with the general verdict for the appellees, as to control the latter, and entitle the appellants to a judgment? And this is the question presented by the first error assigned.

We have already said in this opinion that the answers of the jury to the second, third, and fourth interrogatories asked by the appellants render it clear that the memorandum made by Tinkler was not made by the authority of the appellants. The answer to the sixth question of the appellees is to the same effect. This being the only written memorandum claimed to have been made, it follows that there was no note or memorandum of the bargain in writing, signed by the appellants, or by any other person by their authority, to take the case out of the statute of frauds. And the answers of the jury to the seventh interrogatory of the appellees, and to the sixth, tenth, and twenty-first of those asked by the appellants, make it equally clear that nothing was given in earnest to bind the bargain, or in part payment for the corn. We need not here decide whether the check for six hundred dollars could constitute such part payment, as it is shown by the special finding of the jury that it was not so intended by the parties. It was, then, a parol contract for the sale of goods, to be delivered at a future time, the price of which exceeded fifty dollars; and as there was no part delivery,

Newland *v.* The State.

nor earnest to bind the bargain, nor part payment, it was obnoxious to the seventh section of the statute of frauds, and no action could be maintained upon it. The appellants were therefore entitled to a judgment on the special findings of the jury, notwithstanding the general verdict for the appellees.

The appellees have assigned cross errors on the action of the court in rendering a judgment for the appellants on the second paragraph of the complaint, notwithstanding there was a general verdict for the appellees; but no abstract of that portion of the record has been furnished by either party, and as the appellees have failed to furnish any argument upon the cross errors, we do not examine them.

The judgment for the appellees on the first paragraph of the complaint is reversed and set aside, with costs, and the cause remanded, with instructions to the Civil Circuit Court to render judgment for the appellants for costs on that paragraph of the complaint, on the special findings of the jury.

R. P. Davidson and W. D. Wallace, for appellants.

W. C. Wilson, S. A. Huff, and B. W. Langdon, for appellees.

NEWLAND *v.* THE STATE.

CRIMINAL LAW.—*Indictment.—Trespass on Land.*—An indictment charged that the defendant, “on, &c., at, &c., did unlawfully cut down and remove, on and from land belonging to M. S., in said county, one tree of the value of fifty cents, the property of M. S., without having license so to do from said M. S., or any other competent authority.”

Held, that this was a sufficiently certain description of the land upon which the trespass was committed.

APPEAL from the Tippecanoe Criminal Circuit Court.

Davis v. Calloway.

FRAZER, J.—The overruling of a motion to quash the indictment presents the only question in this record. It was charged that the defendant, “on, &c., at, &c., did unlawfully cut down and remove, on and from land belonging to M. S., in said county, one tree of the value of fifty cents, the property of M. S., without having a license so to do from said M. S., or any other competent authority.”

The objection made to the indictment is, that it did not describe the lands upon which the trespass was committed, and is therefore not sufficiently certain. No direct authority is cited in support of the objection, and the approved precedents, strong evidence of what the law is, found in ARCHIBALD and WHARTON, do not sustain it.

The judgment is affirmed, with costs.

W. C. Wilson, for appellant.

D. E. Williamson, Attorney General, and J. R. Carnahan, for the State.

DAVIS v. CALLOWAY.

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159 610

CONTRACT.—Promise for the Benefit of Third Person.—The promise of A. to B. to pay B.'s indebtedness to C. may be enforced in equity by C., though not a party to the agreement. If the promise be accepted by C., he may maintain an action at law thereon.

SAME.—Rescission of.—Until such acceptance by C., the parties to the agreement may rescind it.

SAME.—Consideration.—A promise may be a sufficient consideration for a promise.

APPEAL from the Wayne Civil Circuit Court.

GREGORY, J.—Davis sued Calloway on a promise by the latter to pay the former one hundred dollars, in an agreement between Calloway and one Keplinger and others. The first paragraph of the complaint sets out a copy of the

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written agreement, which shows on its face a consideration passing from Keplinger and others to Calloway, for the promise of the latter to Davis. There is an averment of an indebtedness to the same amount from Keplinger to Davis. A demurrer was sustained to this paragraph. The plaintiff, under leave to amend, added two other paragraphs to the complaint. Demurrs were sustained to each, and a final judgment rendered against the appellant.

The second paragraph differs from the first in this: the consideration passing from Keplinger and others to Calloway is averred; and it is further alleged, that after the execution of the agreement, the parties thereto, by mutual consent, by and between themselves, without the knowledge or consent of the appellant, rescinded and changed the terms of the contract, which had been fully executed as changed.

The third paragraph avers that, on, &c., Keplinger was indebted to the plaintiff in the sum of one hundred dollars for professional services as attorney and counselor at law, and being so indebted, Calloway did, on, &c., promise to pay the plaintiff one hundred dollars, in consideration that Keplinger, his wife, and one Gwynn, would agree, in writing, with said Calloway to the performance of certain things specified in the writing, set out in the first paragraph of the complaint. That the writing was executed, and as a part of it, the appellee promised to pay in hand to the plaintiff one hundred dollars, which was by the plaintiff accepted and agreed to, which was due and unpaid.

The court below erred in sustaining the demurrs to the first and third paragraphs of the complaint. Davis, as the creditor of Keplinger, could maintain an action on the promise of Calloway. This is not an open question in this State.

In *Cross v. Truesdale*, 28 Ind. 44, the rulings of this court were carefully reviewed; and it was held, in conformity with *Bird v. Lanius*, 7 id. 615; *Day v. Patterson*, 18 id. 114; and *Devol v. McIntosh*, 23 id. 529, that an action can

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be maintained by one in whose favor such a promise is made, although he is not a party to the agreement.

By the code, the complaint can be regarded as a bill in chancery under the old practice. In equity, Davis had the right to enforce the promise of Calloway to pay the debt due him from Keplinger. *Devol v. McIntosh, supra.*

The third paragraph avers an acceptance of the promise of Calloway by Davis. This would be good at law. But the second paragraph shows that the agreement was rescinded by the parties thereto. Until the acceptance by Davis of the promise of Calloway, the parties to the agreement had the right to rescind. That paragraph is bad, and the court below committed no error in sustaining the demurrer to it. It is proper to state that there was no question as to parties raised by the demurrsers.

It was not necessary to aver performance of the agreement by Keplinger and his co-obligors. The promise to pay Davis was not dependent, but was made in consideration of stipulations in the agreement of Keplinger and others.

The judgment is reversed, with costs, and the cause remanded, with directions to overrule the demurrsers to the first and third paragraphs of the complaint, and for further proceedings.

W. A. Peeler, for appellant.

W. S. Ballenger, for appellee.

STONE v. THE STATE. Three Cases.

CRIMINAL LAW.—Indictment.—Qualifications of Grand Jurors.—That an indictment does not show that the grand jury presenting it was composed of persons possessing the statutory qualifications is immaterial, the caption showing the indictment to have been found by the grand jury of a county named, in the circuit court of such county, and the record reciting that the grand jurors were sworn as required by law.

SAME.—Name of Grand Juror.—Among the names of the grand jurors in the record was "A. J. Moore," and the record recited that "Andrew J. Moore" was appointed foreman.

Held, that there was nothing in the objection, that the names of the members of the grand jury were not, for this reason, sufficiently set out.

SAME.—Name Unknown.—Evidence.—Where an indictment states that the Christian, or "given" name of the defendant is unknown to the grand jury, and there is no proof of the allegation on the trial, there can be no conviction.

SAME.—Liquor Law.—Evidence.—A person having purchased liquor in a store room from one who stated that it must not be drank there, opened a door and stepped into a shed attached to the store room building, placed the bottle of liquor and tumblers furnished by the seller on a box found there, and, when the liquor had been drank, left the tumblers on the box, and passed back through the store room to the street, the entire premises belonging to a third person, the store room, but not the shed, being rented by the seller.

Held, that the seller suffered the liquor to be drank in his house within the intent of the statute.

APPEAL from the Jefferson Circuit Court.

RAY, J.—Indictment for selling intoxicating liquors, not having been licensed to engage in the traffic. Motion to quash overruled. The grounds of the motion are, 1. That the indictment does not show that the grand jury presenting the indictment was composed of persons possessing the statutory qualifications. In the caption it is shown that the indictment is found by the grand jury of Jefferson county in the Jefferson Circuit Court. This is sufficient. *Weinzorpftin v. The State*, 7 Blackf. 186. The record before us recites that the grand jurors were sworn as required by law.

2. That the names of the members of the grand jury are not sufficiently set out. The record includes "A. J. Moore"

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among the grand jurors, and recites that Andrew J. Moore was appointed foreman. There is nothing in the objection.

There was a trial, and finding for the State. A motion for a new trial was overruled. The indictment charges the appellant as "one Stone whose given name is to the jurors unknown." Our statute requires the names of the parties to be stated, or the person to be described as one whose name is unknown to the grand jury. 2 G. & H. 400, sections 54 and 60. In *Commonwealth v. Stoddard* 9 Allen, 280, it was held that where the name of the person injured was unknown to the grand jury, it may be so alleged in the indictment, but the proof must correspond with the allegation, and unless the traverse jury are satisfied that the name was unknown to the grand jury, the defendant is not to be convicted. In this case there is no proof on the subject, and the jury could not form any conclusion as to the truth of the averment that the Christian name of the defendant was unknown to the grand jury. For this failure of proof the case must be reversed.

The indictment charges the sale of liquor, and that it was suffered by defendant to be drank in his house, or in his shed. The proof was, that defendant having sold the liquor in his store room, stated that it must not be drank there. The purchaser opened a door and stepped into a shed attached to the store room building, and found there a dry goods box, on which he placed the bottle and tumblers furnished him by the defendant. He left the tumblers on the box in the shed and passed back through the store room into the street, when the liquor had been drank. There was proof that the entire premises were owned by a third party, and that the defendant had rented the store room, but not this shed.

We think, however, the jury could fairly infer from the evidence that the shed was in fact under the control of the defendant, and that he suffered the liquor to be drank therein, and that it did in fact form part of his house within the intent of the statute.

Smith *v.* Noe.

The judgment is reversed, and the cause remanded for a new trial.

The same cause for reversal exists in *Stone v. The State*, No. 1222, *Same v. Same*, No. 1223, and the same entry will be made.

E. R. and J. L. Wilson, for appellant.

D. E. Williamson, Attorney General, for the State.

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166	655

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PRACTICE.—*Judgment by Mistake, &c.—Statute Construed.*—The act of March 4th, 1867 (Acts 1867, p. 100), amendatory of section 99 of the code, changes the discretionary power of the court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, to an imperative duty; applies the limitation to the time of commencing the proceeding, instead of the time of granting the relief; extends the time to two years; and authorizes the proceeding to be instituted by complaint or motion.

PROCESS.—*False Return.*—Where the service of summons is on Sunday, and therefore void, so that if true return be made no legal default can be taken, but the sheriff returns the writ as served on Monday, the defendant cannot impeach the false return for the purpose of avoiding an appearance to the action.

APPEAL from the Marion Civil Circuit Court.

ELLIOTT, J.—On the 18th of June, 1864, Noe commenced this suit against Smith, the appellant, and Hall, on an account or claim assigned to him by Olney Gould. It is alleged in the complaint that Smith and Hall were partners in large contracts for supplying the United States with horses for the army, and desiring the services of Gould to aid them in filling said contracts, they agreed to give him one-eighth interest in the profits that might be realized therefrom; that under said agreement, some 6,200 horses were purchased and delivered to the United States, on the contracts of Smith and Hall. The profits on these amounted

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to the sum of \$80,000, of which sum Gould was entitled to \$10,000, which Smith and Hall refused to pay; and that Gould had assigned his claim therein to Noe, the plaintiff.

Smith was not a resident of this State. Hall was served with process, and the cause was continued from term to term, until the November term, 1867, when it appeared by the return of the sheriff of Jackson county, in this State, to a summons directed to him, that he served the same on Smith, by reading, on the 27th of May, 1867.

On the second day of the term last named both Smith and Hall were defaulted. On the 7th day of the term, at the instance of the plaintiff, the case was submitted to the court, on evidence, and on the 9th day of the same term the court found for the plaintiff, and assessed his damages at \$12,000, and rendered a judgment therefor. The plaintiff then entered a *remititur* for \$2,000 of the judgment.

Afterwards, on the 23d day of November, 1867, and eighteenth judicial day of the same term of the court, Smith filed a written motion, supported by affidavits of himself and others, praying the court to set aside said default and judgment against him, "taken through his mistake, surprise, inadvertence, and excusable neglect."

Smith states in his affidavit, among other things, that he is, and for many years has been, a citizen of the State of Ohio, and that the summons in the case was served on him, by a person representing himself to be the sheriff of Jackson county, Indiana, on Sunday, whilst he was passing through this State, on the Ohio and Mississippi railroad; that about the 1st of June thereafter, he received by mail, from the same person who served the summons on him, as he supposed, a copy of said summons, which he immediately delivered to Mr. Tilden, his attorney at Cincinnati, Ohio, where he (Smith) then resided; that Mr. Tilden advised him that said copy of the summons ought to be forwarded to Messrs. McDonald, Roache, and Sheeks, his attorneys at Indianapolis, Indiana, who had been retained by him in said cause immediately after it was commenced, and more

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than a year before he was so served with process; that Mr. Tilden thereupon agreed to send it for him to McDonald, Roache, and Sheeks, and that he is informed and believes that Mr. Tilden did so forward it by mail; that he is informed and believes that the letter enclosing the copy of said summons was not received by McDonald, Roache, and Sheeks, and that they were not aware of said service until after the default was taken. The affiant further states that when the judgment was obtained, he was at Memphis, in the State of Tennessee, and was not aware that judgment had been obtained in said cause, until Wednesday, the 20th of November, 1867, and was not aware that his presence was required in said cause until Tuesday, the 19th of said month; that relying on his counsel aforesaid to attend to said cause, he did not give the same his personal attention, but waited for and expected them to give him notice when the same might be required of him; that owing to the mis-carriage of said letter to McDonald, Roache, and Sheeks containing the copy of the summons, they were not informed thereof until after a default had been taken in said cause.

“And he avers that he has a meritorious defense to said action, in this, viz: That he was not at any time in partnership with said Gould, the plaintiff’s assignor; that at the time the plaintiff claims that such partnership existed, this defendant and his co-defendant, Hall, were engaged in some joint transactions in the business mentioned in said complaint; and he is informed that, by some arrangement between said Gould and Hall, exclusively, said Gould was to have some interest in the share of said Hall in the profits of said business; that your petitioner and Hall were to divide the profits of said business equally, and since said transaction, he is informed that said Gould was to receive one-fourth of said Hall’s share of the profits of said business; that affiant was not aware during the progress of said business as to the exact terms of the contract between said Hall and said Gould; but after said business was closed, he

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was informed that the said Gould claimed to have the interest as above stated. And affiant states that he never made, or authorized any person to make for him, any contract with said Gould, giving him, the said Gould, any interest whatever with him, said Smith, in said business, or the profits thereof. And affiant states that the profits of said business were not eighty thousand dollars, the amount claimed in the complaint of said Noe, but amounted to the sum of twenty-eight thousand four hundred and eight dollars and eighty-four cents, and no more, one half of which sum was paid to C. W. Hall, and one-half retained by this petitioner; that at the time of said settlement between this affiant and said Hall, which occurred in the spring of 1863, said Gould did not claim any interest whatever out of the share of this petitioner of the profits of said business, and never stated to this affiant until this suit was brought that he claimed any interest whatever therein. And your petitioner states that he has in his possession, and will produce before the court, books of account of said transaction, containing the number of animals purchased, the prices paid, the prices received, the cash contributed, and the discount account. And your petitioner states that he desires to appear and defend himself in said cause, which he believes he can do successfully; that he is able and willing to pay any judgment that may hereafter be rendered in said cause; and affiant says that, by unavoidable casualty and mistake, unmixed with any fault or negligence of his, or the fault or negligence of his counsel, an undue advantage has been gained in said proceedings; and he says that but for said mistake and unavoidable casualty, he would have appeared and defended said cause; that affiant is entirely unacquainted with, and ignorant of, court proceedings; and believing that said McDonald, Roache, and Sheeks, his counsel aforesaid, had received said copy of said summons, and that they would notify him when his presence would be required, he left the matter to their control."

William Tilden states in his affidavit:—"I am a member

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of the bar of Hamilton county, Ohio; was admitted to the practice in said State in April, 1854; have resided in the city of Cincinnati, and have practiced law there, since October 10th, 1858; have been the resident attorney of said defendant Smith since the fall of 1862. Some time in the summer or fall of 1866, as nearly as I can now state, in the absence of my books, the defendant Smith called upon me at my office in the said city of Cincinnati, and stated that he had incidentally learned that the complainant Noe had brought suit against him in said court. Said Smith stated that he had never been served with process in said cause, and accidentally learned of its existence. I immediately recommended him to employ counsel in the city of Indianapolis to attend to his interest, and on his behalf wrote McDonald, Roache, and Sheeks, attorneys at said place, and requested them to examine the matter as to service on Smith. Said McDonald, Roache, and Sheeks reported to me, first by telegram, and afterwards by mail, that there had not been any service of summons on said Smith; that it had been attempted to make service on said Smith by publication, and reported said service invalid. Affiant is informed that, afterward, counsel for complainant abandoned said pretended service by publication, and made the service on said Smith described in said Smith's petition herewith filed.

"And affiant further states that, afterward, and on or about the 1st day of June, 1867, the said Smith called at the office of this affiant and delivered to him a paper writing, inclosed in an envelope bearing the usual marks of having passed through a post-office somewhere in the State of Indiana. That said paper writing purported to be a copy of a summons in this cause. Said Smith then asked if it was right and legal to serve him on Sunday, stating at the same time that the said summons was served on him, on the cars of the Ohio & Mississippi Railroad, on Sunday evening, about half after ten o'clock. I informed him that I would send said paper to his counsel, McDonald, Roache, and

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Sheeks, and call their attention to the circumstances attending said service. On the same day I wrote to said McDonald, Roache, and Sheeks, and directed their attention to the question of service on Sunday. I also inclosed with said letter the paper aforesaid, handed me by said Smith, and stated to said Smith that his counsel at Indianapolis would attend to his interest in said case. I was absent from said city of Cincinnati during the greater part of the summer of 1867, and returned on the 18th of September, and not finding any letters from said McDonald, Roache, and Sheeks, I wrote them on the 21st day of said month concerning the case of said Smith in their hands; but not deeming it necessary to say anything further on the point of service, and supposing my letter to them containing said copy of said summons had been received, I did not again mention the subject. I am informed and believe that said letter, sent by myself in June, has never been received by said McDonald, Roache, and Sheeks. And affiant further states that on the same day that said letter inclosing said summons was written as above stated, and within a short time afterward, this affiant handed said letter to Mr. H. J. Harrop, then in the employ of this affiant, and whose affidavit is hereto attached, and directed said Harrop to attend to the mailing of said letter, as appears by the statements of said Harrop in his said affidavit. This affiant says he has good reason to and doth believe that said Smith has a good defense in said action, and that he, the said Smith, can successfully defend the same if an opportunity shall be given him."

Henry J. Harrop in his affidavit says:—"I am a member of the Bar of Hamilton county; that in the months of May and June, and in the summer and fall of 1867, I was in the office of W. Tilden, attorney at law, in the city of Cincinnati, Ohio; that part of my office duties consisted in mailing letters and attending to the business correspondence carried on in said office; that affiant, during said months, mailed a number of business letters to the firm of McDonald, Roache, and Sheeks, attorneys at law, at Indianapolis,

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Indiana; that I deposited in the Cincinnati post-office at least two letters directed by said Tilden to said firm of McDonald, Roache, and Sheeks in said months. On one of said occasions during said months said Tilden handed me a letter directed to said firm of McDonald, Roache, and Sheeks, and requested me to see that said letter should be mailed on that day, as it was important that said attorneys should receive it at once, and I remember distinctly of mailing said letter in the receiving box of the post-office of Cincinnati, Ohio."

David Sheeks states in his affidavit:—"Several months before the first day of the present term of this court, the firm of McDonald, Roache, and Sheeks was employed, through William Tilden, Esq., an attorney at law residing in the city of Cincinnati, in the State of Ohio, to attend to the case for the said defendant Smith in the above entitled cause; that after said employment it became the duty of this affiant especially to attend to the same for said firm, and the same was left in his care; that at the time of said employment, said Smith, as he is informed and believes, had not been served with process therein, except by publication, which was deemed insufficient by said firm to enable the plaintiff to take personal judgment against said Smith, and said cause was continued for process against him, said Smith; that the said Sheeks had not, and he is informed and believes that neither of the other members of said firm of McDonald, Roache, and Sheeks had any knowledge whatever of process other than by publication having been had, until after a default had been taken herein at this present term of this court against said Smith. And he further states that he never received any letters from said William Tilden, Esq., informing said firm, or any member thereof, of any service on said Smith in said cause, nor did he ever receive from said Tilden, or any other person, any copy of any summons or any notice that had been served on said Smith. And he further states that no appearance has been entered by said firm for said Smith in said cause."

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J. E. McDonald, being sworn, says:—"That he has read the foregoing affidavit of David Sheeks, and that the same is true in substance and matter of fact; that the affiant was a member of the firm of McDonald, Roache, and Sheeks at the time the facts therein stated transpired, and that he had no personal knowledge of any service on said Smith, except by publication, until after the default had been taken in the cause, when he gave verbal notice to the attorneys of the plaintiff, that as soon as the defendant Smith could be notified and brought here, a motion would be made to set aside the default."

The following statement, by agreement of the parties, was taken as a part of the foregoing affidavit of J. E. McDonald, to wit:—"That at the time the default was taken in said cause, no member of the firm of McDonald, Roache, and Sheeks was present in the court; that on Wednesday or Thursday of the first week of the court, and on the day that said firm learned of the default, Mr. Sheeks, one of the members of the firm, applied to the attorneys of the plaintiff to set aside the default and permit said Smith to defend said suit, and thereupon the attorneys for the plaintiff proposed to set aside said default, if the said Smith would file his answer on or before the sixth day of the term, but said Sheeks declined to do so, for the reason that he had not been able to communicate with the said Smith, and did not know his whereabouts, or that he could then be prepared to answer and defend the suit; that on Monday, the seventh day of the term, when the said cause was tried, Joseph E. McDonald, one of the attorneys of the defendant, was present in court, and knew of said trial, but did not enter any appearance for said Smith; that said McDonald then gave verbal notice that as soon as he could communicate to the said Smith he would move to set aside the judgment."

The court overruled the motion, and refused to set aside the default and judgment, to which the appellant excepted. This ruling presents the only question in the case.

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The motion is founded on section ninety-nine of the code, as amended by the act of March 4th, 1867. Acts 1867, 100. That part of the original section which relates to the subject of the motion in this case, is as follows: "The court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and at any time within one year relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings."

It has been repeatedly held that applications under this provision are addressed to the discretion of the lower court; and, although the action of the court upon them is subject to be reviewed on appeal, that there must be a plain case of the abuse of that discretion in order to justify the interference of this court. *Carlisle v. Wilkinson*, 12 Ind. 91; *Cooper v. Johnson*, 26 Ind. 247. The same clause of the section as amended by the act of 1867, reads as follows: "The court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years." It is further provided by section two of the amendatory act, that the section as amended "shall apply to the case of any mistake, inadvertence, surprise, or excusable neglect, or omission, existing prior to the passage of the same, upon complaint or motion filed within one year after the occurrence of such mistake, surprise, excusable neglect, or otherwise."

It will be observed, by a comparison of the original with the amended section, that the only changes made by the amendment are in that clause of the section copied above, which changes are: 1. It changes the discretionary power of the court by the use of the word "shall" to an imperative duty to "relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect." 2. It applies the limitation to the time

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of instituting the proceeding for relief, instead of the time within which it could be granted by the court, and extends the time to two years instead of one. 3. It authorizes the proceeding to be instituted either by complaint or motion. It is evident that the legislature, by the use of the word "shall" in the section as amended, intended to adopt a more liberal practice in such cases, by excluding the idea of any mere discretionary power in the court in granting or refusing the application, and to confer on the party the right to demand the relief, when it is made to appear that the judgment was taken against him through his "mistake, inadvertence, surprise, or excusable neglect," and that this court, in reviewing the question, should be governed by the same rule.

Applying this view of the statute to the facts presented by the record in this case, we think the Circuit Court erred in refusing to set aside the default and judgment and permit the appellant to present his defense. The judgment taken against him is for a large sum, and if it be true, as it appears by his affidavit, that he has a valid defense to the entire action, he will be compelled to suffer great injustice if the judgment and default are not set aside. He is, and for years past has been, a resident of the State of Ohio, in the courts of which he was liable to be sued, and, by the service of process upon him, compelled to appear and defend, or suffer the consequences. But he was under no obligation, either legal or moral, to voluntarily submit himself to the jurisdiction of the courts of this State for the purposes of the litigation, and it is evident that he did not intend to do so. He was aware of the institution of the action in the Marion Circuit Court, and of an effort to bring him before that court by publication, and immediately thereafter retained the services of McDonald, Roache, and Sheeks in looking to the case and guarding his rights therein; and on being advised by them that no personal judgment could be taken against him merely upon notice by publication, he rested in a feeling of security, and did

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not look further to the matter. Thus the case stood until the summons was served on him, on the Ohio and Mississippi railroad, in this State, by the sheriff of Jackson county, as the appellant testifies, on Sunday, the 26th of May, 1867. A few days subsequent to that service, the appellant received by mail, at Cincinnati, Ohio, a copy of the summons, which he immediately delivered to Mr. Tilden, his resident counsel there, and at the same time informed Mr. Tilden that the summons was served on him in Jackson county, on Sunday, and, at his instance, Mr. Tilden enclosed the copy of the summons in a letter directed to McDonald, Roache, and Sheeks, and called their attention to the fact that he was informed by the appellant that the summons was served on him on Sunday. That the letter of Tilden to McDonald, Roache, and Sheeks was regularly mailed at Cincinnati, Ohio, is not controverted; and that it miscarried and was never received by them is not denied. No negligence can be imputed to them, as they had no knowledge or information that process had been served on Smith, and neither of them was present in court at the time he was called and defaulted. Smith not being a resident of this State, they could not anticipate that a personal service in the State would be made upon him. The return of the sheriff to the summons shows that it was served on the 27th of May, 1867, being Monday, and not on Sunday, the 26th, as sworn to by Smith. The return, however false, could not be controverted or impeached by the latter for the purpose of avoiding an appearance to the action, nor is that the object of the affidavit. But if the service was in fact made on Sunday, as Smith swears it was, it would be void, and would impose no legal obligation on him to appear to the action; and hence, if the sheriff's return had shown that fact, no legal default could have been taken. It cannot be presumed that Smith could anticipate that the sheriff would make a false return as to the date of the service, and he could not, therefore, be greatly at fault in waiting to be advised in the matter by

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his attorneys at Indianapolis, to whom he had caused the copy of the summons to be forwarded by mail, their attention being called to the fact that the service was made on Sunday. Smith had reason to presume, as he did, that the letter of Tilden containing the copy of the summons had been received by McDonald, Roache, and Sheeks. In this he was mistaken. The presumption was reasonable, and the mistake was not, therefore, culpable. McDonald, Roache, and Sheeks were made aware of the fact that Smith did not intend to submit himself to the jurisdiction of the Marion Circuit Court, unless legally compelled to do so, and it is evident that one, if not the principal, object of their employment was, that they might advise him and see that he was not entrapped into the necessity of so appearing to the action. Under such circumstances, it was but reasonable that Smith, after communicating with them, should await their advice, rather than go to Indianapolis and look after the matter personally, and thus place himself within the jurisdiction of the court, where he would be liable to be personally served with process; and if he thus waited for his attorneys to advise him longer than strict diligence might seem to justify, without again calling their attention to the subject, the circumstances of the case would seem to require that it should be regarded only as an inadvertence—an excusable neglect.

The judgment is reversed, with costs, and the cause remanded, with directions that the default and judgment against the appellant, Smith, be set aside, and that he be permitted to answer, and for further proceedings.

W. Tilden, J. E. McDonald, A. L. Roache, and E. M. McDonald, for appellant.

A. G. Porter, B. Harrison, and W. P. Fishback, for appellee.

Piersol v. Grimes.

PIERSOL v. GRIMES.

PROMISSORY NOTE.—Full Indorsement.—Alteration of.—If a full indorsement of a promissory note be changed by striking out the name of the indorsee and inserting that of another person, without the consent of the indorser, such other person cannot, as indorsee, maintain an action against the indorser.

Spoliation of Written Instrument.—The spoliation of an instrument by a stranger, without the knowledge or consent of the parties in interest, cannot change the rights or liabilities of those parties.

APPEAL from the Montgomery Circuit Court.

FRAZER, J.—Piersol sued Grimes upon the assignment of a promissory note, alleging the assignment to have been made by indorsement to Barton (who is made a party to answer to his interest), and that Barton afterwards transferred the note and indorsement by mere delivery to the plaintiff, and that some one, without the knowledge or consent of the plaintiff, had erased the name of Barton in the assignment and inserted the name of the plaintiff. The complaint also alleged facts showing due diligence in prosecuting the maker of the note to insolvency, &c. A demurrer to the complaint was sustained below; and error is assigned upon that ruling.

The opinion of this court in this case when formerly here (25 Ind. 246) is relied on to support the ruling of the court below. The last sentence of that opinion, if wrested from the connection and from the point then under consideration, would give some countenance to the position assumed. But that is not a fair construction of the language. It must be applied to the question then under consideration, which was merely whether Piersol could sue as indorsee, the indorsement having been changed without Grimes' consent by striking out the name of Barton and inserting that of Piersol. It was not intended to say more than merely to give a negative solution to that question.

But we have now a very different question. It is whether

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the spoliation of an instrument by a stranger, without the knowledge or consent of the parties in interest, can change the rights or liabilities of those parties. Certainly, it cannot. No member of this court has ever entertained a doubt upon that question, and on principle it is difficult to find any ground for a difference of opinion upon it.

Judgment reversed, with costs, and the cause remanded, with directions to overrule the demurrer.

P. S. Kennedy, for appellant.

S. C. and L. B. Willson, for appellee.

FISHER *v.* EWING.

RECORD.—*Matter Stricken from Pleading.*—Matter ordered by the court to be stricken from a pleading does not belong to the record, and cannot be made a part thereof by the clerk, but should be set out in full in a bill of exceptions.

APPEAL from the Cass Common Pleas.

RAY, C. J.—The appellant desires to present for our consideration what he contends is error in the court below, in striking out certain parts of a paragraph of his answer.

The bill of exceptions states the matter stricken out as follows: “commencing at the twenty-third line of page four at the words, ‘and the defendant further says,’ the remainder of said page, and the entire page five, to the sentence concluding, ‘during which the said building was in point of fact erected.’ In other words, the motion was to strike out all that part of said answer inclusive between the twenty-third line, on page four, and the bottom of page five, concluding as above.”

The clerk has, in a memorandum on the margin of the transcript, referred us to the answer, which he says contains in brackets the matter stricken out by the court. But up-

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on the ruling of the court, that matter no longer formed part of the answer, and the clerk could not properly bring it into this court as part of the record, and we cannot therefore regard it as before us. It should have been set out in full in the bill of exceptions. If the motion had been overruled, it would have left the matter in the record, and we might, perhaps, discover what it was by the reference in the bill of exceptions.

No other error being assigned, the judgment is affirmed, with costs.

D. D. Pratt and D. P. Baldwin, for appellant.

D. D. Dykeman, for appellee.

HARRIS v. THE STATE.

WITNESS.—Evidence of Character.—Where there has been an attempt to impeach a witness by proof of statements out of court contrary to what he has testified at the trial, the party calling him has the right to sustain him by proof of general good character for truth.

NEW TRIAL.—Charge to Jury.—A misstatement of the law in the charge to the jury on the trial of an indictment, which, under all the circumstances, could not prejudice the defendant, is not a good cause for a new trial.

APPEAL from the Wayne Criminal Circuit Court.

GREGORY, J.—The appellant was indicted for an assault and battery with intent to commit a rape; a trial was had before a jury, and a verdict of guilty of assault and battery only; fine five hundred dollars. Motion for a new trial overruled.

The court, over the objection of the defendant, instructed the jury that, "inasmuch as counsel on both sides have spoken to you about the reputation and good character of both the defendant and prosecuting witness, Ellen Patty, it becomes my duty to say to you that you should give no time

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to the discussion of the general character of either of these persons, for the simple reason that there has been no testimony in regard to the general character of either.

"Counsel for the defendant offered no evidence touching the character of their client, but you must not therefore fall into the error of inferring that his general character is not good. If his general character had been shown to be good it would have been a circumstance in his favor, and it would have been my duty to charge you as to the tendency and effect of that proof. As the evidence stands it simply amounts to this, viz., that you must entertain no presumptions whatever as to the general character of the defendant, because there is no evidence whatever on which you can base a presumption in reference thereto.

"So also, with regard to the general character of Ellen Patty. It is a matter, or rather a subject, on which there is not one particle of evidence. The defense has not offered any testimony as to the general character of Mrs. Patty, and counsel for the State had no right to produce evidence that her general reputation is or was good.

"To speak more directly of the facts of this case, Ellen Patty made a certain statement in the course of her examination as a witness for the State, or rather, to be more exact, the defense, on her cross-examination, asked her, whether she had not made a certain statement to one Martha Harris; she answered in the negative. The defense afterwards called Martha Harris as a witness and attempted to contradict her. How far such attempt succeeded, or whether it entirely failed, is a question for you to determine. I only say that, under these circumstances, I would not have permitted the State to offer the evidence of the good character of Mrs. Patty."

As there was an attempt to impeach Mrs. Patty, the State had the right to sustain her by proof of general good character for truth, but we cannot see how this misstatement of the law could prejudice the appellant.

The jury were plainly told, that they could not, in the

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entire absence of proof, indulge in presumptions either way. This was right. The character of the prosecuting witness having been attacked, was open to the State as well as to the defendant. Such character was not a matter peculiarly within the knowledge of either party. The failure to sustain on the one side, or to attack on the other, gave no legal ground for presumptions.

The defendant offered no evidence of the general character of the witness. The court gave the defense the benefit of the attempted contradiction. This was the entire right of the appellant, so far as impeaching the testimony of Ellen Patty was concerned. The court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

W. A. Peele, J. Perry, and J. B. & J. F. Julian, for appellant.

D. E. Williamson, Attorney General, for the State.

WISE *v.* EASTHAM.

PLEADING.—Answer.—A paragraph of an answer began thus: “That at the time of said supposed wrongful taking of the property in the first count of said plaintiff’s complaint mentioned, the defendant,” &c.

Held, that this was sufficiently explicit to distinguish this paragraph as intended to apply only to the first paragraph of the complaint.

TAXES.—Authority of City Treasurer.—The tax duplicate and the warrant attached thereto, provided for by section 23 of the act for the incorporation of cities (Act 1867, p. 41), constitute the city treasurer’s authority for enforcing the payment of taxes by seizure and sale of property, and, taken together, confer on him the same power to seize and sell personal property as is conferred by an execution upon a sheriff; but the duplicate, unaccompanied by the warrant, is not sufficient.

SAME.—Alteration of Assessment.—The city treasurer has power to assess

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persons whom the assessor has failed to list, but has no authority to alter upon the tax duplicate an assessment made by the assessor, or to add to such assessment by the assessor property omitted therein belonging to the person assessed.

APPEAL from the Knox Circuit Court.

Wise, the appellant, sued Eastham. The complaint is in two paragraphs. The first charges that the defendant, on the 11th day of June, 1868, wrongfully took from the plaintiff's possession, one horse, buggy, and harness, the property of the plaintiff, and refused to release the same unless the plaintiff would pay him one hundred and fifty-two dollars and fifty cents, and that, for the purpose of obtaining possession of said property, the plaintiff paid the defendant the sum demanded.

The second paragraph alleges, that on the 1st day of March, 1865, the plaintiff delivered to the assessor of the city of Vincennes a statement of his taxable property of that year, which was accepted by the assessor; that in accordance with said statement taxes were assessed by the city against the plaintiff; that on the 1st day of December, 1865, the defendant, he then being the treasurer of said city, and having in his hands the tax duplicate thereof for the year 1865, on which taxes were assessed against the plaintiff, according to the list of his property so furnished by him to the assessor, wrongfully and unlawfully added to the taxes so assessed against the plaintiff one hundred and twenty-five dollars, claimed by him to be error in the assessment of the plaintiff's personal property; that the sum so wrongfully added to the plaintiff's taxes was returned by the defendant from year to year as delinquent, and as such was added to the plaintiff's taxes in each subsequent year; and that on the 11th of December, 1867, the defendant, under pretense of collecting said sum of money, took into his possession the plaintiff's horse, buggy, and harness, and, to procure the release thereof, the plaintiff was compelled to, and did pay the defendant the sum of one hundred and fifty-two dollars and fifty cents.

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The defendant answered in four paragraphs :—1. A general denial to both paragraphs of the complaint.

2. "That at the time of said supposed wrongful taking of the property in the first count of the plaintiff's complaint mentioned, the defendant was the treasurer of the city of Vincennes, and as such had the tax duplicate; that there was assessed on the duplicate against the plaintiff money, bank notes, and bonds, before that time owned by him, and subject to be assessed for taxes for the year 1865, on which there had been assessed a tax of one hundred and twenty-five dollars, which, with costs and expenses in the collection of the same, amounted to the sum of one hundred and fifty-two dollars and fifty cents; that the supposed wrongs were done by the defendant as treasurer, within the city, and in the collection of said tax after plaintiff had notice.

The third paragraph is an answer to the second paragraph of the complaint, and charges that the plaintiff did not deliver to the city assessor a true statement of his property, but fraudulently failed to return to the assessor property to the value of twenty-five thousand dollars subject to taxation, consisting of money on hand and on deposit, and money loaned and at interest; that the tax complained of was assessed on this property; that the defendant, before he made the assessment, requested the plaintiff to list said property, which he refused to do. Whereupon the defendant listed the same and made the assessment complained of, in the collection of which the supposed trespasses were committed.

The fourth paragraph, which is also in answer to the second paragraph of the complaint, alleges that on the 29th of December, 1864, the plaintiff was possessed of a large amount of personal property in said city, subject to taxation, of the value of fifty thousand dollars, consisting of money on hand and on deposit and money at interest; that for the fraudulent purpose of avoiding the payment of tax on this property, the plaintiff removed the same to some secret place until the 8th day of January, 1865, when he

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redeposited the same in the place where it had been usually kept in said city; that on this property the defendant made the assessment complained of, after he had requested the plaintiff to list the same, which he refused to do; that there was due on account of this property, taxes, costs, charges, and expenses, amounting to the sum collected by him, in the collection of which the supposed wrongs were committed.

The plaintiff demurred to the second, third, and fourth paragraphs of the answer separately. The demurrer was overruled, and plaintiff excepted.

He then replied to the second paragraph of the answer:—

1. That the duplicate of 1865 came to the hands of the defendant with taxes assessed against the plaintiff according to the listing of the city assessor; that the defendant unlawfully changed the assessment against the plaintiff by adding thereto as follows: "Additional amount personal assessed on account error," and in the column for value of personal property, "\$25,000," and in the column for taxes, "\$125;" and thereby increased the plaintiff's taxes one hundred and twenty-five dollars; that said trespasses were committed in attempting to collect this one hundred and twenty-five dollars; that there was no other or different assessment, and the property now claimed to have been assessed was not otherwise described than as above stated.

The second paragraph avers the same facts as the first, and in addition thereto, it states that the assessment was made by the defendant in 1865; that he then, from year to year, returned the amount so assessed by him as delinquent, by which he procured penalty and interest to be added, which together on the duplicate of 1867 amounted to one hundred and fifty-two dollars and fifty cents, in the second paragraph of the answer mentioned; that the plaintiff each year, and before said trespasses were committed, paid all the sums assessed against him, except the amount so assessed by the defendant, with interest and penalty thereon, which he refused to pay; that the sums of money were not assessed or added to

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the assessment otherwise than as above stated, which defendant when he committed the trespasses well knew; and that there was no other or different statement or description made of the property on account of which said assessment was made than that above stated.

The third paragraph is a reply to the third and fourth paragraphs of the answer, and is, in substance, the same as the first.

In the fourth paragraph the plaintiff protests against having had the property and money charged in the third and fourth paragraphs of the answer, and denies that the defendant assessed against the plaintiff the said one hundred and twenty-five dollars on account of the money, property, and choses in action in said paragraphs mentioned.

There was a trial by jury, which resulted in a finding and judgment for the defendant, a motion for a new trial having been overruled.

ELLIOTT, J.—It is contended by the appellant that the Circuit Court erred in overruling the demurrer to the second paragraph of the answer. The first objection urged to it is, that it assumes to answer both paragraphs of the complaint, when, if the facts alleged constitute an answer to any part of the complaint, they can only be so applied to the first paragraph, and do not present any ground of defense to the second. But the paragraph, as we understand it, is only pleaded to the first paragraph of the complaint. The language used, in referring to the paragraph intended to be answered, is not as explicit as it might be, but we think it is sufficient to exclude the inference that it was intended to apply to the second paragraph of the complaint. Is it a good answer to the first paragraph of the complaint?

The 23d section of the act for the incorporation of cities (Acts 1867, p. 41) makes it the duty of the city clerk, annually, between the first Monday of June and the fifteenth of November, to make out a duplicate of the taxes assessed therein, and requires him to "deliver the same, with a war-

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rant under the corporate seal of said city, attached thereto, to the treasurer of said city, directing him that of the goods and chattels of all and every person named in said duplicate, and of all persons whose names may be added thereto by him, he shall cause to be made, by distress and sale if necessary, the amount of tax charged against each of said persons named in said duplicate," &c. It is averred in the second paragraph of the answer, that the defendant was the city treasurer, and as such had in his possession the tax duplicate upon which there was assessed against the plaintiff certain taxes, &c., in the collection of which he did the acts complained of; but it contains no averment that the duplicate was accompanied by the warrant required by the statute.

The duplicate and warrant constitute the treasurer's authority for enforcing the payment of taxes by seizure and sale of property. Taken together, they constitute a writ in the nature of an execution, and confer upon the treasurer the same power to seize and sell personal property that is conferred by an execution upon a sheriff; but the duplicate alone is not sufficient. It does not justify a seizure of property for taxes, unless it is accompanied by a warrant as required by the statute. As the paragraph failed to show that fact, it was bad, and the demurrer to it should have been sustained.

The second error assigned is upon the action of the court in overruling the appellant's demurrs to the third and fourth paragraphs of the answer, which were pleaded to the second paragraph of the complaint. The material question presented by these answers is, had the treasurer authority, by virtue of his office as such, and having in his hands the tax duplicate for the year 1865, to correct the assessment of the plaintiff's property by adding thereto, or by assessing property belonging to him which he had failed to give to the assessor for the year 1865? The only provision of the statute, referred to by counsel, or that we have been able to find, bearing on the question, is the 49th section of the act

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for the incorporation of cities, &c., 1 G. & H. 229, which provides that "the treasurer shall require of each and every person whom the assessor failed to list, a statement of the taxable property, and the value thereof, which shall be given under the same regulations as if furnished the assessor; and for that purpose the treasurer is authorized to administer the necessary oath or affirmation. If such person fail to furnish such statement, the treasurer shall value the same as the assessor is required to do in like cases." But this does not seem to cover the case. Wise, it appears, was regularly assessed by the city assessor, and was charged on the duplicate for 1865 with taxes levied on personal property. The assessor, therefore, did not fail to list him; but it is alleged that Wise failed to give the assessor, when listed, a list of all the personal property owned by him.

The assessment roll, when returned by the assessor, is presumed to be correct, and to contain a proper assessment of all property owned by the persons listed subject to taxation. Under the act of 1852, the common council and assessor constituted a board of equalization (to which the act of 1867 has added the clerk), with power to equalize the assessments and valuations made by the assessor, as right and justice may require. This duty, however, is required to be performed before the duplicate is made out and delivered to the treasurer. The principal duty of the treasurer is to collect the taxes as he finds them upon the duplicate, and, however erroneous or imperfect the assessments may be, he has no power over them other than that specially conferred by law. The section of the act above referred to does not confer on him the power to alter the assessments made by the assessor, or to add thereto property belonging to a person assessed, but which was omitted in the assessment. It simply confers on the treasurer the power to assess persons "whom the assessor failed to list." We think, therefore, that the additional assessment made by the defendant in 1865 against the appellant was without

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authority of law, and that under the second paragraph of the complaint, the appellant was entitled to recover the damages resulting to him therefrom. Neither the third nor fourth paragraph of the answer presents a valid defense to the second paragraph of the complaint, and the court erred in overruling the demurrs to them.

Certain instructions given by the court to the jury are also complained of. They contain, substantially, the same errors as in the rulings on the demurrs to the answer, and, as the case is reversed on the pleadings, a further notice of them is rendered unnecessary.

The judgment is reversed, with costs, and the cause remanded, with instructions to the Circuit Court to sustain the demurrs to the second, third, and fourth paragraphs of the answer, with leave to amend.

F. W. Viehe, for appellant.

N. F. Malott and *T. R. Cobb*, for appellee.

McGRIMES and Others v. THE STATE.

Liquor Law.—Disorderly House.—An action can be maintained by the State on a bond executed under the requirements of the act to regulate the sale of spirituous liquors, approved March 5th, 1859, for the breach of keeping a disorderly house.

PRACTICE.—Motion for New Trial.—Damages.—A motion for a new trial assigned for cause, “error in finding any sum against the defendants and giving judgment for the plaintiff, when the judgment should have been given against the State, and in favor of the defendants, because, at most, only nominal damages could be recovered on the evidence against the defendants.”

Held, that the question of the assessment of too large an amount of recovery was not presented.

APPEAL from the Shelby Common Pleas.

GREGORY, J.—Suit by the State against the appellants for an alleged breach of the condition of a bond executed by

McGrimes and Others v. The State.

Daniel McGrimes and his sureties, under the requirements of the act to regulate the sale of spirituous liquors, approved March 5th, 1859. The breach assigned was the keeping a disorderly house. The defendants answered by the general denial. Trial by the court. Finding for the State, assessing the damages at forty dollars. Motion by the defendants for a new trial, for the following causes: first, error in overruling a demurrer to the complaint; second, "error in finding any sum against the defendants, and giving judgment for the plaintiff, when judgment should have been given against the State, and in favor of the defendants, because, at most, only nominal damages could be recovered on the evidence against the defendants."

We have held that this action can be maintained for the breach complained of. *The State v. Whitener*, 23 Ind. 124.

The only open question is that as to the measure of damages. The fifth cause for a new trial in the code is, "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." 2 G. & H. 212, sec. 352. cl. 5. The cause assigned for a new trial is not that the assessment was too large, but that the court erred in assessing any amount. The reason given, that, "at most, only nominal damages could be recovered," is not, it is true, very cogent, but it is nevertheless given as a reason why the court erred in assessing any amount, and not as a cause for a new trial. The question argued by counsel is not before the court.

The judgment is affirmed, with costs.

M. M. Ray, J. W. Gordon, and W. March, for appellants.

D. E. Williamson, Attorney General, for the State.

Robinius v. Lister and Lister.

30	142
128	389
30	142
167	273

ROBINIUS v. LISTER AND LISTER.

PRACTICE.—*Deposition.*—In an action by a married woman concerning her separate property, her husband being joined as plaintiff, the deposition of the husband, appearing as such on its face, was admitted in evidence over the objection of the defendant, made for the first time after entering on the trial.

Held, that this ruling was correct.

Covenant of Warranty.—*Incumbrance.*—*Evidence.*—Where, at the time of the conveyance of land by warranty deed in exchange for other land, it is agreed by the parties that the taxes due upon the lands so mutually exchanged shall be set off against each other, the taxes on the land so conveyed by warranty deed are part of the consideration for such deed, and in an action against the vendor by the vendee, or one deriving title by warranty deed from the vendee, to recover money paid by the plaintiff to remove the incumbrance of the taxes so assumed by the vendee, parol proof of such contract concerning the taxes is admissible.

SAME.—*Satisfaction of Breach.*—If it be considered in such case that the warranty of the vendor is broken, still the vendee can thus agree upon the damages, and payment by the vendor, before action brought, of the taxes due on the land received by him in exchange will satisfy the breach.

APPEAL from the Marion Common Pleas.

RAY, C. J.—This was an action commenced before a justice of the peace, to recover money paid by Jane K. Lister, to remove an incumbrance, consisting of taxes due on lands purchased by her from one Smith, who had received a conveyance of said land from appellant. The deeds from Robinius to Smith and from the latter to Mrs. Lister contained covenants of warranty against incumbrances. The husband of the appellee was joined with her in the action. A paragraph of answer was filed denying any privity of contract between the appellant and Mrs. Lister. In a second paragraph it was alleged that at the time of conveyance by Robinius to Smith of the land upon which the incumbrance existed, Robinius received a deed from said Smith for certain other land, and it was at the time agreed between them, that the taxes remaining due upon the lands so mutually exchanged and conveyed should be set off against each other, and that the taxes on the land received

Robinius v. Lister and Lister.

by Robinius exceeded in amount the taxes on the land conveyed by Robinius. In the Common Pleas Court, the appellees on the trial offered to read the deposition of John Lister, the husband of Mrs. Lister, to which the appellant objected, but the deposition was admitted. This ruling was correct. The objection appeared upon the face of the deposition, and should have been made before entering upon the trial. Our statute requires that "all objections to the validity of any deposition, or its admissibility in evidence, shall be made before entering on the trial, not afterwards," unless the deposition does not disclose the ground of the objection. 2 G. & H. 178, sec. 266.

The appellant, in defense, offered to prove the facts set out in his answer, and that he had paid taxes due upon the land received from Smith, in amount exceeding the sum for which the action was brought. This evidence was excluded by the court. This was error. If Mrs. Lister elected to sue upon the covenant in the deed from Robinius to Smith, she certainly could stand in no better position than Smith would have occupied had he brought the action. The agreement between Robinius and Smith made the tax upon the land conveyed part of the consideration for the deed, and proof of the covenant was admissible. *Pitman v. Conner*, 27 Ind. 337. Or, if it be considered that the warranty of Robinius was broken, still Smith could agree upon the damages, and upon their payment the breach was satisfied. The evidence should have been admitted, as it constituted a defense to the action.

The judgment is reversed, and the cause remanded for a new trial.

J. L. Ketcham and J. L. Mitchell, for appellant.

L. Barbour and C. P. Jacobs, for appellees.

Clarke v. Henshaw.

30	144
128	364
30	144
148	288
30	144
154	420

CLARKE v. HENSHAW.

DECEDENTS' ESTATES.—*Mortgage.*—The personal property of a decedent is the primary fund for the payment of debts, and the filing of a note made by the decedent in his lifetime, and secured by mortgage on his real estate, as a claim against his estate, entitles the holder to a *pro rata* dividend out of the assets.

SAME.—*Sale by Administrator to Discharge Lien.*—Nothing less than full payment of such a note releases the mortgage, though the holder of the note have notice of the sale of the mortgaged property by the administrator, under an order of court, and receive his *pro rata* portion of the proceeds, unless the property be sold under the provisions of the statute (2 G. & H. 512, sec. 89) authorizing a sale for the purpose of discharging the lien.

APPEAL from the Johnson Circuit Court.

RAY, C. J.—This suit was to foreclose a mortgage made by Samuel B. McKeehan to secure several notes, one of which had been assigned to the plaintiff.

The complaint is in one paragraph, and alleges that Samuel B. McKeehan in his lifetime executed certain promissory notes, one of which was afterwards assigned to the plaintiff, Jesse B. Henshaw; that to secure these notes, he and his wife, Pamela McKeehan, at the same time executed to M. W. Thomas, the original payee of said notes, a mortgage on certain real estate in Johnson county, Indiana, copies of which mortgage and the note held by the plaintiff are filed with the complaint; that said mortgage was duly recorded in Johnson county; that said McKeehan died, leaving certain persons named in the complaint his heirs, all of whom are made parties; that the note sued on was filed in the Common Pleas Court as a claim against said estate, and admitted, and payments made thereon, leaving a balance due and unpaid after final settlement of the estate; that one John Clarke claimed an interest in the mortgaged premises, and was also made a defendant. Prayer for judgment of foreclosure for the balance due on the note. On the calling of the cause the defendants, except John Clarke, were called and defaulted. Clarke answered in four paragraphs.

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1. As to one undivided half of the mortgaged premises, admitting the execution of the note and mortgage and alleging that afterwards said McKeehan sold and conveyed one half of said premises to one Lysander Adams, and that at the time of his death said McKeehan owned but one half of said property; that after his death the note sued on was filed by the plaintiff against his estate, and on final distribution he received his *pro rata* share of the assets.

2. As to the other undivided half of said premises, admitting the making of the note and mortgage and the death of said McKeehan, and alleging that an administrator was appointed; that the claim sued on was filed and admitted as a claim against said estate; that said administrator procured an order of the proper court to sell said half of said premises, under which said half was sold to Lysander Adams for two thousand dollars, the full value thereof and the best price that could be obtained therefor, all of which was done with the full knowledge of the plaintiff; that said estate was settled as insolvent; that the whole of the proceeds of the sale of said half of said mortgaged premises was paid on the claim of said plaintiff and other notes secured by said mortgage in just and ratable proportion; that said plaintiff received the amount paid on his claim with full knowledge that said half of said premises had been so sold, and that the amount paid him was a part of the proceeds of said sale. Copies of the proceedings in the Common Pleas Court are made exhibits.

3. And as to the whole of said complaint, admitting the making of the note and mortgage, the death of McKeehan, &c., and alleging a sale of one half of said premises by McKeehan to Lysander Adams for four thousand dollars, its full value; that after the death of McKeehan the notes of said Adams for said purchase money came into the hands of the administrator as a part of the assets of said estate, which plaintiff well knew; that said plaintiff and all the holders of the other notes secured by said mortgage filed

Clarke v. Henshaw.

all their notes in the Common Pleas Court against said estate; all of which were allowed by said court; that the administrator of McKeehan's estate procured an order of court, with the full knowledge of said plaintiff, to sell the remaining half of said premises; that under said order he sold said half to Lysander Adams for two thousand dollars, the full value and best bid; that said plaintiff had notice of said order of sale; that said estate was settled as insolvent, and the whole assets, including the proceeds of Adams' notes for the half sold by McKeehan and the proceeds of the sale of the other half by the administrator, were paid on the mortgage debts, including that of plaintiff, in ratable proportion; that the plaintiff, with a full knowledge of all the foregoing facts, and that the money so paid was the proceeds of said sales of the mortgaged premises, received his portion of said assets on said final settlement, and still retains the same. Copies of proceedings in court are made exhibits.

4. Payment generally.

To the whole of this answer the plaintiff demurred, filing separate demurrers to each paragraph. The court sustained the demurrers to the first, second and third paragraphs of the answer, and the defendant Clarke withdrew the fourth. To the sustaining of said demurrers Clarke excepted, and declining to amend, the court found for the plaintiff.

The transcript shows that the proceeding was this: all claims were filed with the administrator; he paid on them proportionally; when funds failed he sold real estate, without any special order of court as to the mortgages and proceeds; the proceeds went into the general fund and were paid *pro rata* on all debts.

The ruling of the court below was correct. The filing of the note as a claim against the estate entitled the holder to a *pro rata* dividend out of the assets of the estate. The personal property is the primary fund from which debts are to be paid, and nothing less than full payment of the notes releases the mortgage, unless the property so incumbered

Hamrick v. The Danville and North Salem Gravel Road Company.

be sold under the provisions of the statute authorizing a sale for this purpose. 2 G. & H. 512, sec. 89; *Foltz v. Peters* 16 Ind. 244. The answer does not allege that the sales of the property so incumbered were made free from the lien of the mortgage. The fact that appellee had notice of the sale and received a *pro rata* portion of the proceeds, is of no importance, as the purchaser took the land subject to his mortgage.

The judgment is affirmed, with five per cent. damages and costs.

G. M. Overstreet and A. B. Hunter, for appellant.

W. Henderson, S. E. Perkins, L. Jordan, and *S. E. Perkins, Jr.*, for appellee.

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HAMRICK v. THE DANVILLE AND NORTH SALEM GRAVEL ROAD COMPANY.

30	147
169	212
169	213

PRACTICE.—Appeal.—No appeal can be taken to the Supreme Court from an order remanding a cause to a court from which there has been an attempt to change the venue, at the costs of the party taking the change.

APPEAL from the Putnam Common Pleas.

GREGORY, J.—There was an attempt to change the venue in this case from the Hendricks Common Pleas Court. The affidavit for the change was filed April 23d, 1868; the papers were filed in the court below on the 5th of June, three days before the commencement of the June term thereof. After an appearance by the appellee, the court on its own motion ordered the case to be stricken from the docket and certified back with the papers to the Hendricks Common Pleas, at the costs of the appellant. The case is still pending. There is no final judgment from which an appeal can be taken to this court. 2 G. & H. 269, sec. 550. The order remanding the case at the costs of the party taking the

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change is not embraced in section 576 of the code, authorizing appeals from certain interlocutory orders therein specified. 2 G. & H. 277.

There is no question before this court as to the order complained of. It will be time to consider that when we know the result of the suit.

The appeal is dismissed at the costs of the appellant.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

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| 30 148
| 185 400

LEE AND WIFE v. BACK.

PARENT AND CHILD.—*Custody*.—*Jurisdiction*.—A judgment, the effect of which is to deprive a father of the right to the custody of his infant child, without jurisdiction of the person of the father having been acquired by notice, is void.

COLLATERAL PROCEEDINGS.—*Fraud*.—A stranger to a judgment may attack it in a collateral proceeding for fraud used in obtaining it.

APPEAL from the Decatur Circuit Court.

GREGORY, J.—A writ of *habeas corpus* was issued in the court below on the petition of the appellee, setting forth that he is the father of Eliza Back, aged four years and nine months, and that the appellants have the possession of the child and refuse to deliver it to him.

The defendants return to the writ, that they have had the child in their custody and control since February, 1864; that on or about the _____ day of April, 1864, the appellee, who is the father of the infant, was a resident of Hamilton county, in the State of Ohio; at said time the mother of the infant child died, and prior to the death of the mother, the father and mother both gave the

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child to the respondents, and requested them to take charge of and raise and educate it, which they consented to do; that afterwards, in June, 1864, less than three months after the death of his wife, the appellee intermarried by the name of John Myers with — —, whose name is unknown, at Newport, Kentucky; that afterwards the appellee reclaimed the child from the respondents, and retained the custody thereof until the 12th of July, 1865, when, while in prison as a deserter, in Cincinnati, the petitioner earnestly requested respondents to take the child, and respondents agreed to, and did, receive it, agreeing to rear and educate it as their own; that the appellee executed to respondents at the time the following paper:

“CINCINNATI, 12th July, 1864.

“*Mrs. Christian Paul Snively,* Please let the bearer, Mrs. J. H. Lee, have my child, Eliza Baugh, and you oblige

“JOHN BAUGH.”

“N. B. This child I give to Mrs. J. H. Lee, to raise and keep.

JOHN BAUGH.

That from and after that time the respondents have maintained and supported the child and treated it as their own; that on the 26th of December, 1866, by virtue of the statute of the State of Ohio (which is set out), by the order and decree of the Probate Court of Hamilton county, Ohio, the respondents adopted the child. A certified transcript of the order and decree is made a part of the answer. The application was made and the order and decree based on the allegation that the mother of the child was dead, and that the father had abandoned it.

The statute of Ohio set forth in the answer does not in terms require notice to be given to the parents in case of abandonment of their children, and in such case authorizes any inhabitant of that State to adopt a child thus abandoned. The transcript filed with the answer shows no notice to the father, but the appointment of a next friend for the child. There was no appearance by the father. The case is entitled, “In the matter of the adoption of

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Eliza Baugh, a minor child, and for a change of name." The return further avers that the child and the respondents were residents of the county of Hamilton, Ohio, and resided therein at the time of the adoption. Wherefore the respondents say that they are entitled to the care and custody of the child; that they are proper persons to have such custody; that the child desires to remain with them; that the child is the only heir of respondents, and that they are worth four thousand dollars.

The appellee answered the return, that in August, 1862, he and the mother of the child were *bona fide* residents of Indianapolis, Marion county, Indiana; that at the breaking out of the late civil war he enlisted in the military service of the United States; that the child was born on the 1st of February, 1863, in the city of Indianapolis, Indiana, while the father was in the army; that shortly after the birth of the child the mother took sick, and as the petitioner could not get a furlough, he left the army without leave, to visit his sick wife; that while at home he and his wife and child moved to the city of Cincinnati, Ohio, and remained there until the death of his wife; that while there, on the 12th of July, 1864, the petitioner executed an order to Mrs. Christian Paul Snively, authorizing her to deliver the child to the respondent, Mrs. J. H. Lee, but that so much of exhibit "B" in respondents' answer as purported to give the child to Mrs. J. H. Lee, to raise and to keep, he denies the execution of the same, and says that he never did, at any time, give the child to her, or any one else, to raise and to keep, but it was expressly understood that the petitioner was to have the child on his return from the army; that thereafter he immediately returned to the army, and continued in the service until the 11th of January, 1866, when he was honorably discharged from company F, 52d regiment Indiana volunteers, at Indianapolis, Indiana; that after his return to the army the petitioner sent money to Mrs. Lee for the benefit of the child; that ever since his discharge he has resided in Indianapolis,

Lee and Wife v. Back.

Indiana; that immediately after his return from the army he visited the child at Cincinnati, and made a payment of twenty dollars to respondents for the support of the child; that in June, 1866, the petitioner was married in Indianapolis, to his present wife, and in the following July he and his wife went to Cincinnati and both begged the respondents to give the custody of the child to the petitioner, which they refused; that the petitioner has ever since been desirous of getting the custody of the child from the respondents, of which fact they have had knowledge at all times; that afterwards, on the 26th of December, 1866, the respondents fraudulently procured the order and decree set out in the return, without the knowledge and consent of the petitioner; that at the time, the petitioner was a *bona fide* resident of Marion county, Indiana, of which respondents had knowledge; that petitioner was not a party to the proceedings, and had no knowledge thereof; neither was he, at the time, within the State of Ohio, or within the jurisdiction of said probate court; that the petitioner had no knowledge of the proceedings or decree of said court until it was produced in this cause; that the petitioner has never abandoned the child; that the respondents are unfit to have the custody and education of the child; that the respondents do not live together agreeably as husband and wife; that the respondent Hannah is in the habit of using profane and obscene language in the presence of the child; that the petitioner is abundantly able and willing to raise and educate the child as befits her station in life, and is a proper person to raise and educate it; that the respondents have voluntarily left their former place of residence in Hamilton county, Ohio, and have brought the child to Decatur county, Indiana, where they have established their residence; that petitioner is a resident of Marion county, Indiana. This answer was sworn to by the petitioner. A motion to strike out this answer was overruled. The appellants then demurred thereto, which demurrer was overruled. The petitioner then filed the general denial to the return.

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The appellants replied to the answer by the general denial. Trial by the court; finding, "that the appellee is the father of Eliza Baugh, and, as such, entitled to her custody and possession, and that she is unlawfully detained from him by the respondents, John H. Lee and Hannah Lee, at said county."

The appellants moved for a new trial, which was overruled. A bill of exceptions makes the evidence a part of the record.

The question in this case is as to the effect of the record of the order and decree of the Probate Court of Hamilton county, Ohio.

If the proceeding is to be regarded as an adversary proceeding, the effect of which is to deprive the father of his right to the custody of his infant child, then the judgment is void for the want of notice. In *Chase v. Hathaway*, 14 Mass. 222, Chief Justice PARKER, in speaking for the court, says:—"It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property, unless he has forfeited them by the standing laws of the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever the legislature has provided that, on account of crime or misfortune, the public safety or convenience demands a suspension of these essential rights of the individual, and has provided a judicial process, by which the facts shall be ascertained; it is to be understood as required that the tribunal, to which is committed the duty of inquiring and determining, shall give opportunity to the subject to be heard in support of his innocence or his capacity."

Under the facts averred in the answer to the return, the court in Ohio could not have obtained jurisdiction of the person of the appellee. But if this proceeding in the Ohio court is to be regarded as one affecting the child, to which the father was not and could not have been a party, then it

Tousey v. Lockwood and Another.

is clear, that so far as his right to the custody of his infant child is concerned, the order and decree may be attacked for fraud.

The rule is stated by Chief Justice SHAW, in *Greene v. Greene*, 2 Gray, 361, thus: "that fraud was a matter of fact, and, if used in obtaining judgment, was a deceit on the court and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must of necessity be admitted to aver it was fraudulent."

The allegation on which the court in Ohio acted, that the father had abandoned his child, was false: the averment was made in bad faith by the appellants, and was a fraud on the court.

The court committed no error in overruling the motion for a new trial. The evidence sustains the finding. The answer to the return was good.

The judgment is affirmed, with costs.

ELLIOTT, J., dissents.

J. Gavin and G. Gryden, for appellants.

J. W. Gordon and W. March, for appellee.

TOUSEY v. LOCKWOOD and Another.

30	153
141	549
30	153
144	606

PRACTICE.—*Special Finding by the Court.*—A mere statement of evidence, though it be all the evidence, in a finding by the judge, cannot answer any of the purposes of a special finding, or be a substitute for a bill of exceptions.

APPEAL from the Putnam Circuit Court.

FRAZER, J.—The only exception in this record is to the action of the Circuit Court in overruling a motion for a new trial based upon the grounds that the finding was contrary to law and the evidence. The evidence is not in the record by a bill of exceptions, but the judge has stated some

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of it in the finding itself. Whether he thus has stated all the evidence does not appear. We cannot therefore reverse upon the evidence. It is not the office of a verdict to preserve the evidence, nor to contain it. It should find facts, and a finding by the judge may also state conclusions of law upon the facts found, but a mere statement of evidence, though it be all the evidence, cannot answer any of the purposes of a special finding, nor can it be a substitute for a bill of exceptions. *Davis v. Franklin*, 25 Ind. 407.

The judgment is affirmed, with costs.

J. A. Matson, for appellant.

E. F. Ritter, for appellees.

30	154
135	508
30	154
138	850
30	154
146	83

Rowe and Another v. BECKETT and Another.

TRUSTS AND POWERS.—A railroad company conveyed by deed forty-four tracts of land, each described, numbered, and valued, to trustees, to secure the payment of bonds, issued by the former, and "put upon the market to raise money, reserving the power to sell any portion of the land at its valuation; and, upon the surrender by the company to the trustees of bonds equal in amount to the land sold, the latter were empowered to convey in fee.

Held, that this was a power coupled with an interest, and required only a substantial compliance with its terms.

SAME.—Practice.—The deed from the trustees passed the legal title, and the equities of the plaintiff could not be inquired into in an action under the code for the "recovery of real property," on a complaint averring the *legal* right of the plaintiff to the possession.

CONVEYANCE.—A deed in which the grantor uses the words "release, remise, and forever quit claim," passes the fee to the alienee.

ADVERSE POSSESSION.—The possession of the grantor is not adverse to the title of his grantee.

CHAMPERTY.—The conveyance of land, pending a suit to set aside a deed

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therefor, if made to one not having any connection with the action, or knowledge of it, is not void for champerty.

APPEAL from the Delaware Circuit Court.

GREGORY, J.—Suit by the appellants against the appellees to “recover real property.” The complaint avers that the plaintiffs “are the owners in fee simple and entitled to the possession” of the land in controversy; and that the defendants hold possession of the same without right.

The defendants answered by the general denial. Beckett answered, that he was the owner of the land, setting forth a deed of conveyance thereof from Thomas Corwin and Thomas J. Sample to James Sample, and a deed from the latter to Beckett. The deed from Corwin and Sample to James Sample was a conveyance made under a power contained in a deed of trust from “The Cincinnati, New Castle and Michigan Railroad Company.” The plaintiffs replied by the general denial and averring that the deed from Corwin and Sample to James Sample was void.

Trial by the court; finding for the defendants, and that Beckett was the equitable owner and had the legal title to the land. The plaintiffs moved for a new trial. The court below overruled the motion. A bill of exceptions contains the evidence.

The trust deed from the railroad company to Corwin and Sample was executed in 1853, and conveyed to them forty-four tracts of land (each of which was described, numbered, and valued), in trust, to secure the payment of bonds issued by the company and put upon the market. The deed contained the following:—“And it is hereby expressly agreed and understood that the said party of the first part reserves the right to sell any portion of the property herein at a price not less than the sum herein named as the appraised value thereof, or a proportionate price for any portion of any of the said several pieces of property; and whenever the said party of the first part, having made such sale, shall purchase and surrender to the said parties of the second

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part or their successors in said trust, to be cancelled, an amount of the bonds herein specified and designated to be secured by this deed of trust, equal to the appraised value of any portion of said property as herein specified, or of a proportional part of the appraised value of any one of said several pieces of property, then the said party of the second part or their successors in said trust shall execute and deliver to such person or persons as the said party of the first part shall designate, a deed in fee simple for such portion of said property."

The deed from Corwin and Sample to James Sample, executed in July, 1856, contains among others the following recitals:—"And whereas the corporate name of the said Cincinnati, New Castle and Michigan Railroad Company has been legally changed to that of the Cincinnati and Chicago Railroad Company, and which said Cincinnati and Chicago Railroad Company is now legally vested with all the rights which belonged to the said Cincinnati, New Castle and Michigan Railroad Company: And whereas the said Cincinnati and Chicago Railroad Company have sold a tract of land included in the property conveyed as aforesaid by the said Deed of Trust, and hereinafter described, and have surrendered to the said Thomas J. Sample and Thomas Corwin to be cancelled, an amount of said bonds equal to the appraised value of the said land as specified in the said Deed of Trust, to wit, six thousand dollars, and having designated the said James Sample as the person to whom the deed of conveyance of the said lot shall be executed and delivered," &c.

The deed from James Sample to Beckett was executed in November, 1856. In 1857, Rowe commenced proceedings in the Delaware Circuit Court to foreclose the deed of trust. A decree was entered in June, 1860, as follows:—"And it is ordered, adjudged, and decreed by the court that, unless the said defendant, The Cincinnati and Chicago Railroad Company, pay and satisfy said sums and costs, within thirty days herefrom, the sheriff of Delaware county pro-

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ceed to advertise and sell, as other lands are sold on execution, giving at least thirty days notice in two newspapers of good circulation in the State of Indiana, the following real estate, or so much thereof as may be necessary to pay and satisfy said judgments, interest, and costs, that is to say, [Here the description of all the lands and town lots, as set out in the deed of trust, is inserted in the decree, except No. 8.] and on the sale thereof according to law, and the payment of the purchase money, that said sheriff execute a good and sufficient deed in fee simple to the said purchasers, and that the equity of redemption of said defendant, the said Cincinnati and Chicago Railroad Company, and all others claiming under or through her after the date of the execution of said deed of trust to Corwin and Sample, except such lands as have been purchased with bonds secured by said deed of trust, be and the same shall be thenceforth forever barred and foreclosed in and to all said premises so sold and conveyed by said sheriff; that a copy of this decree duly certified by the clerk of the Delaware Circuit Court, under the seal of said court, be, and the same shall be, sufficient authority to said sheriff to execute said decree. And it is ordered that if said premises do not sell for a sum sufficient to pay and satisfy said judgments, interest and costs, accrued and to accrue, said plaintiffs have execution to collect the residue. It is further ordered that the foregoing described lands be sold in parcels."

Beckett was not a party to this decree, unless he was included in the description of "all persons holding bonds or otherwise interested in the trust." He was not a party holding bonds. Was he otherwise interested in the trust? If the deed from Corwin and Sample to James Sample vested in the latter the legal as well as the equitable title in and to the land in controversy, then Becket had no interest in the trust. By the conveyance the land therein alienated was taken out of the hands of the trustees, and from thence ceased to be any part of the trust.

The exception in the decree of "such lands as have been

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purchased with bonds secured by the deed of trust" takes them out of the operation of the entire decree. Any other construction would make the exception meaningless. To say that the exception was confined to the foreclosure, and that it did not extend to the order of sale, is to make it amount to nothing.

It is claimed that the deed from Corwin and Sample to James Sample is void for the want of a strict compliance with the terms of the power in the deed of trust under which it was made. There was no evidence offered on the trial as to the circumstances attending the execution of the deed, other than the recitals contained in it. The first inquiry which meets us at the threshold is this: is the power in the deed of trust under which the deed in question was executed, a naked power, or one coupled with an interest? The legal estate in the land was conveyed by the railroad company to the trustees. The power of sale was reserved to the company as mortgagor; the trustees were empowered to make the conveyance on the compliance by the company with the conditions specified in the power.

In *Hunt v. Rousmanier*, 8 Wheat. 174, Chief Justice MARSHALL thus defines what is meant by "a power coupled with an interest:" "Is it an interest in the subject on which the power is to be executed, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing." After stating that a power to A. to sell for his own benefit would not give him an interest, nor would it if his power was to sell for the benefit of B., he adds: "A power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled

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with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it."

The trust deed containing the power conveyed to Corwin and Sample the legal estate in the land, and enabled them to make the conveyance in their own names; and, therefore, the power to do so was within the meaning of the phrase, "coupled with an interest."

Mr. WASHBURN, in his work on Real Property, in speaking of these trust mortgages, says: "It is uniformly held wherever they have been adopted, that such deeds vest in the trustee an actual legal estate and not a mere mortgagee's lien." 2 Washburn on Real Property (3d ed.), 80 § 11.

It is said, in *Rowan v. Lamb*, 4 Greene, 468, "*prima facie*, plaintiff's exhibits showed him to be an owner of the property. He claimed title under McKee by virtue of a deed of trust, executed in August, 1842, to Glasgow and Collier, for the benefit of James Harrison, a creditor. Under these trustees, who were not only vested with power to sell, but also with the legal title, the plaintiff appears by his exhibit in the light of an innocent purchaser. Where trustees are thus vested with the title as well as the power, it is not necessary to show that strict compliance with the directions of the power, as it would be if the power was not coupled with the title."

In *Reece v. Allen*, 5 Gilman (10 Ill.), 236, CATON, J., in speaking for the court, says:—"The only remaining question is whether the grantee of the trustee was bound to show that the conditions of the trust deed had been complied with. This precise question was decided by the Supreme Court of Appeals of Virginia, in the case of *Taylor v. King*, 6 Munf. 358; and also, in *Harris v. Harris*, *ib.* 367. Indeed, in the former case the court went further, and decided that the grantee of the trustee should recover in ejectment, although the jury had specially found that the trustee and purchaser were both guilty of fraud in the transfer. We do not hesitate to agree with the court, that

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the conveyance passed the legal title to the estate, and that it did not devolve upon the purchaser to show that the trustee in making the sale had complied with the conditions specified in the trust deed. If the grantee took the title in fraud of the rights of any of the parties, a court of chancery, within whose peculiar jurisdiction such questions are, would either set aside the sale, or treat him as trustee and compel him to perform the trust."

In *Lessee of Bayard v. Colefax*, 4 Wash. C. C. 38, it is said by the court, that "the right of the surviving trustee, clothed as he was with the legal estate in fee simple, to convey the same to whom, and in what manner he might think proper, cannot be questioned in a court of law, nor can the title of his grantee be impugned, unless it be by some person having a better legal title in himself to oppose to it."

If these authorities enunciate the law, it seems to us clear that the deed from Corwin and Sample, as trustees, to James Sample, vested in the latter the legal title to the land in question, independent of the recitals in it. It is true that the code has abolished all distinction between law and equity, but it will hardly be contended, under the forms of pleading adopted in the case under consideration, that the plaintiff below could resort on the trial to an equitable right of having the deed made by the trustees set aside for a failure to comply with the conditions contained in the power.

A defendant in an action for the recovery of real property, under the general denial, may show any legal or equitable defense he may have. 2 G. & H. 283, sec. 596. But the plaintiff in his complaint must state the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. 2. G. & H. 70, sec. 49, cl. 2. And when the allegation of the claim to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a variance, but a failure of proof. 2. G. & H. 116, sec. 96.

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The complaint in this case avers that the plaintiffs are the owners in fee of the land; proof that they were the equitable owners, and as such had the right to have the deed from the trustees set aside for a failure to comply with the conditions of the power, would not be a variance, but a failure of proof, under the code.

Under a complaint like this, the plaintiff can only recover on a legal title to the possession paramount to the legal or equitable title of the defendant. In *Stehman v. Crull*, 26 Ind. 436, it was held, that "the action 'to recover the possession of real property,' under the code, where the complaint is on the legal title, takes the place of the old action of ejectment, and the plaintiff must show a legal title to the possession before he can recover." The appellees had the right to offer the deed from the trustees, to show that the legal title to the land was not in the appellants, whose title was derived from the sheriff's sale made under the execution issued on the decree of foreclosure.

In *Bank of the United States v. Benning*, 4. Cranch, C. C. 81, it was held, that if the deeds were offered only to show the transmission of the legal title, the truth of the recitals need not be proved *aliunde*.

We think the recitals in the deed from the trustees were *prima facie* proof of the matters therein stated, and a majority of the court rule that they are sufficient to uphold the conveyance to James Sample. It has been seen that the power vested in the trustees to convey was a power coupled with an interest; in such a case the law only requires a substantial compliance with the terms of the power.

The surrender to the trustees, to be cancelled, of bonds secured by the deed of trust, to the amount of the valuation of the land conveyed, was the substantial thing provided for; and this we think the recitals show was done. It is claimed that the recitals do not show that the bonds surrendered were ever put in circulation.

We think that the legal presumption arising from the

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transaction as it appeared in evidence was, that the bonds described in the trust mortgage were sold by the railroad company. It is true, that the deed of trust was executed before the bonds had a legal existence, but the entering upon the execution of the trust shows that bonds were sold; what amount does not, however, appear. It is fair to presume, nothing appearing to the contrary, that the trust deed accomplished its purpose. Indeed, it is difficult to see how bonds could be surrendered to be cancelled that never had any vitality. If the bonds were put in circulation, it could make no difference to the holders thereof how that portion of them which was surrendered was obtained by the railroad company. The holders of the other bonds had no interest whatever in that matter. The cancellation left them with the same security for their debt as they had before. When six thousand dollars worth of the land was conveyed by the trustees, just that amount of bonds was cancelled, leaving the residue of the lands as a security for that much less of the mortgage debt.

It was urged in argument, that the deed from the trustees passed no title to James Sample, because it was merely a release. The effective words of conveyance used in this deed are these:—"do hereby release, remise, and forever quitclaim unto the said James Sample, his heirs and assigns forever, all their right, title, interest and estate, legal and equitable in the following described premises, to wit," &c. This is "a good and sufficient conveyance in quitclaim to the grantee, his heirs and assigns." 1 G. & H. 260, sec. 13. A quitclaim deed is as effectual to convey land as a deed with full covenants. *McConnel v. Reed*, 4 Scam. 117. This was recognized as the rule in *Hamilton v. Doolittle*, 27 Ill. 478. Mr. WASHBURN says:—"while a deed of simple release, made to one who has neither an estate in, nor possession of, land, would be merely void, a form of deed of the nature of a release, commonly known as a 'quitclaim deed,' has long been in use in this country, and has not only been regarded, practically, as a mode of conveying an independent

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title to the real property, but is by the statutes of some of the states declared to be effectual for that purpose." 3 Washburn on Real Property (3d ed.), 809.

There is a labored brief by the counsel of the appellants, citing numerous authorities, but in our view they are not applicable. The turning point of the case in judgment is, that the power in the trustees to convey is a power coupled with an interest. The cases cited relate to the execution of naked powers, not coupled with an interest. It is claimed that the deed from the trustees is void, because Jacob Carver was in the adverse possession of the land at the time of the conveyance, and had an action pending for it, to quiet his title and possession. Carver conveyed the land to the Railroad Company. His possession could not be adverse to that of his own alienee and those claiming under it.

Carver's suit was brought to rescind his conveyance. He failed in his action. It is true his suit was pending when the trustees conveyed to James Sample. Such an action could not have the effect of suspending the execution of the trust. James Sample was in no way connected with the suit, and his right could not be affected by the pending litigation. The evidence does not make a case of champerty within the rule recognized in the case of *West v. Raymond*, 21 Ind. 305, cited by appellants' counsel.

The judgment is affirmed, with costs.

J. Smith, C. E. Shipley, A. Kilgore, J. Davis, and C. Fox,
for appellants.

T. J. Sample and W. March, for appellees.

30 163
128 271

Rowe and Another v. Lewis and Another.

TRUSTS AND POWERS.—A deed conveying real estate to trustees to secure the payment of bonds of the grantor, put in circulation for the purpose of

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borrowing money, vests the legal title in the trustees, and a power to convey contained in such deed is coupled with an interest.

SAME.—In such case the law requires only a substantial compliance with the terms of the power.

SAME.—A railroad company conveyed forty-four tracts of land, each numbered, described, and valued, to trustees, to secure the payment of bonds amounting in the aggregate to seventy-five thousand dollars, put upon the market to raise money, reserving the right in the company to sell any portion of the land at the valuation thereof, and upon the surrender to the trustees of bonds to the amount of the land sold by the company, the former were empowered to convey the land in fee.

Held, that this was a power coupled with an interest, and that the surrender of bonds to the trustees to an amount equal to the valuation of the land so sold was a substantial compliance with the terms of the power.

HARMLESS ERROR.—A trial of the issues of fact pending an issue of law on a demurrer to an immaterial paragraph of a reply is a harmless error.

APPEAL from the Delaware Circuit Court.

GREGORY, J.—Suit by the appellants against the appellees to “recover real property.” The complaint is in the statutory form, averring a legal title to the possession.

The defendants answered, that on the 1st of September, 1853, “The Cincinnati, New Castle and Michigan Railroad Company,” for the purpose of borrowing money with which to build her road, issued bonds to the amount of seventy-five thousand dollars; and, for the purpose of securing the payment of said bonds, by a deed of trust and mortgage, a copy of which is made a part of the answer, conveyed to Thomas J. Sample and Thomas Corwin real estate, including the lands in suit, to the value, as appraised in said mortgage and deed of trust, of ninety-three thousand dollars; that it was agreed and provided in said deed, that whenever said company should sell any portion of said lands, and surrender to said trustees an amount of said bonds so issued and secured equal to the value of the portion of said lands so sold as appraised in said deed of trust, said trustees should execute a conveyance in fee simple for said lands so sold to the purchasers designated by said company, and said bonds should be canceled and destroyed; that the name of said corporation was afterwards legally changed to that of “The Cincinnati and Chicago Railroad

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Company," and the latter invested with all the rights and powers of the former corporation; that the lands in suit were appraised in said mortgage at the sum of two thousand three hundred dollars, and the south half of the northeast quarter of section 22, town 21 north, range 10 east, in said county, embraced therein, was appraised at one thousand seven hundred dollars, as appears therein; that afterwards, to wit, on the 15th day of July, 1858, said last corporation sold said lands in controversy to David B. Lupton, for the said sum of two thousand three hundred dollars, who delivered to said corporation two thousand three hundred dollars in amount of said bonds, so secured, and also sold to said Lupton the last tract above mentioned, for said sum of one thousand seven hundred dollars, and he surrendered to said company the amount of the bonds so secured, as above stated, all of which bonds said company, to the amount of four thousand dollars, then and there delivered to said trustees, and the same were by them canceled and destroyed, and thereupon said trustees executed and delivered to said Lupton a conveyance in fee simple for all said land, and said corporation also at the same time executed a like deed to said Lupton; and afterwards, on the 23d day of July, 1858, said Lupton sold and conveyed said land in controversy to said Lewis, defendant, by deed in fee simple, copies of each of which are made parts of the answer; and afterwards, to wit, on the 3d day of January, 1861, there was rendered in said court, in favor of said plaintiffs, and against said corporation and said trustees, judgment of foreclosure of said mortgage upon a portion of said bonds so secured, not including those so delivered up and canceled as above stated, with an order directing the sale of all of said lands embraced in said mortgage, excepting from said judgment of foreclosure and order of sale all of said lands that had been purchased with bonds secured by said deed of trust, in the manuer the lands in controversy were purchased by said defendant as above stated, a copy of which decree is made a part of the answer; that afterwards, on the

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1st of July, 1862, a copy of said judgment and order was duly issued by the clerk of said court, directed to the sheriff of said county, who afterwards, on the 20th of August, 1862, sold thereon the lands in controversy, at public auction, to the plaintiffs, at the court house door of said county, after due notice of time and place, and thereupon executed to the plaintiffs a deed for the same, which sale and deed constitute the only title or claim of title either to said lands or the possession thereof, or any portion of the same, which the plaintiffs then or ever had; that neither the defendants nor said Lupton were parties to, or had any notice of said judgment of Rowe and Bates against said trustees and said company. Lewis asked that his title be quieted, and for all other proper relief.

The trust mortgage made a part of the answer was the same mentioned in *Rowe and Another v. Beckett and Another*, at this term. The deed from the trustees to Lupton is the same in form as that from the trustees to James Sample. Lupton conveyed the land to Lewis, July 23d, 1858, by a deed of bargain and sale, with this covenant: "The grantor hereby covenanting with the grantee, his heirs and assigns, that the title so conveyed is clear, free, and unencumbered, and that he will warrant and defend the same against all claims whatever."

The appellants demurred to the answer, for the following grounds of objection: 1. The said answer does not state facts sufficient to constitute a defense to the action. 2. Each of the several parts of said answer is not stated with sufficient certainty and definiteness. 3. Each of the several parts of said answer is matter that the defendants are estopped to set up in defense of this action.

The demurrer was overruled, and the plaintiffs excepted. The case went to issue, and was tried by the court; finding for the defendants. A motion for a new trial was overruled.

The questions involved in this case are raised by the demurrer to the answer. With two exceptions they are the same as those involved in *Rowe and Another v. Beckett and*

Jemison v. Walsh.

Another, supra. We hold that the power in the trustees to convey was coupled with an interest, or, in other words, was coupled with the legal title; and that the law in such case only requires a substantial compliance with the terms of the power; that the surrender of bonds to the trustees, to be canceled, to an amount equal to the valuation of the land conveyed, was the substantial thing required to be done; that it was immaterial how the railroad company obtained the bonds, whether with money or a sale of the land conveyed. The surrender and cancellation of bonds equal in amount to the valuation of the land conveyed inured to the benefit of the holders of the residue of the bonds. The valuation of the land was greater than the amount of the bonds issued. The surrender of a part increased the security of the remainder. The reply that Lupton was secretary of the railroad company at the time of the conveyance to him was immaterial, and the appellants cannot complain of the error of the court in trying the issues of fact pending an issue of law on a demurrer to that reply. The appellants were not injured by the error.

The judgment is affirmed, with costs.

J. Smith, C. E. Shipley, A. Kilgore, J. Davis, and C. Fox,
for appellants.

T. J. Sample and W. March, for appellees.

JEMISON v. WALSH.

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138	496

COMMON PLEAS COURT.—*Jurisdiction.—Vendor's Lien.*—The Court of Common Pleas has jurisdiction to enforce a vendor's lien on real estate for unpaid purchase money.

SAME.—*Title to Real Estate.*—To deprive the Court of Common Pleas of jurisdiction in an action, on the ground that the question of the title to real estate is involved, that question must be the principal thing to be determined.

Jemison v. Walsh.

PROMISSORY NOTE.—Partnership.—The fact that the maker of a note payable to a firm was one of the firm at the time of its execution, if any defense to an action thereon against the maker by one of the late firm to whom the other members except the maker have assigned their interest in the note, only goes to the amount of recovery.

SAME.—The action may be maintained, though there has been no final settlement of partnership accounts, and there are outstanding credits and liabilities.

SAME.—Extension of Time.—Suit on a note payable one day after date. Answer, setting out a written agreement by the parties, made three days after the execution of the note, that in consideration of a sale then made of a stock of goods, to the maker, he should first pay two other notes executed at the date of said agreement to the same payee, due six and twelve months after date, the same to be paid off with the proceeds of said goods, and that after they were so paid, the note in suit should be paid.

Held, that this agreement did not extend the time at which the notes last executed became due, but did extend the time for the payment of the note in suit one year from the date of said agreement.

PRACTICE.—Judgment.—Form of.—Vendor's Lien.—The complaint averred that the consideration of the note was the sale of a town lot to defendant; that a bond to convey the same to him had been executed, and he had been placed in possession, and before bringing suit a deed (which was filed in court) had been tendered and payment demanded. Judgment, in accordance with the prayer, for the amount of the note and interest, and that the same be declared a lien upon the land.

Held, that the facts stated in the complaint did not entitle the plaintiff to this relief, but as no exception was taken to the form of the judgment, this court could not even modify it.

APPEAL from the Johnson Common Pleas.

RAY, C. J.—Action upon a promissory note given by appellant, who was defendant below, to J. M. Sergant & Co., a firm composed of appellee, John M. Sergant, and David Stilly. It is averred that by an arrangement in adjusting the affairs of said firm, Sergant and Stilly before the commencement of the action sold their interest in the note to the appellee, and they were made defendants to answer as to their interest therein. The consideration of the note was the sale by Walsh and Sergant of a town lot to the appellant, and a bond to convey the same to him had been executed, and he had been placed in possession, and before

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bringing the suit a deed had been tendered and payment demanded. The deed was filed in court. Judgment was asked, and that the same be made a lien upon the lot sold.

A demurrer was filed to the complaint, on the ground that the court had no jurisdiction of the subject matter of the action. This was overruled. It is insisted that an action to enforce a vendor's lien involves the question of the title to real estate. A vendor's lien is in the nature of an equitable mortgage, and as the Common Pleas Court has jurisdiction to enforce the contract when this equity is merged in a legal instrument, there can be no force in the objection, as it was held in *Wolcott v. Wigton*, 7 Ind. 44, that the title to real estate must be the principal thing to be determined, or the jurisdiction exists. The appellant filed an answer in several paragraphs. The first was a statutory denial. The second alleged, that at the time of the execution of the note, the firm of J. M. Sergant & Co. consisted of the persons stated in the complaint, together with the appellant, and that he had not disposed of his interest in the note.

To this paragraph a demurser was sustained. The fact stated, if it constituted any defense whatever, only went to the amount of the recovery. It would not be required that the appellant should unite with the appellee in an action against himself upon his own contract.

The third paragraph alleged a mistake in drafting the note, that it should have been made payable one year after date, instead of one day after date, and that three days after its execution a new contract in writing was made by the parties, wherein the sale of the town lot and execution of the note are recited, and it is agreed that in consideration of a sale then made to said appellant of a stock of goods, that said appellant is first to pay two notes, executed at the date of the agreement to John M. Sergant & Co. for \$2,099.18 each, one due six months and the other twelve months after date, and the same are to be paid off with the proceeds of said goods and merchandisde so sold by said J. M. Sergant & Co., and after the said notes are so paid, then the said

Jemison v. Walsh.

Jemison is to pay said Walsh and Sergant the said sum of six hundred and fourteen dollars and ninety-nine cents with accruing interest, and thereupon the said Walsh and Sergant agree to execute a deed for said property. It is assigned as error that a demurrer was sustained to this paragraph.

The effect of the contract was simply to require the payment of the two notes mentioned, in six and twelve months, and as much earlier as the proceeds resulting from the sale of the goods would enable the appellant to liquidate the debt. It required the application of the money realized upon the goods to the discharge of the notes, but did not extend the time when they became due. The contract did, however, extend the time for the payment of the note in suit, one year from the date of the written contract, but as that time had expired before the commencement of the action, the appellant was in default upon that note.

The fourth paragraph avers that when the note was executed the appellant was a member of the firm of J. M. Sergant & Co., the payees of the note, and that there had never been any final settlement of the accounts of said firm, and there were outstanding credits and liabilities of said firm, and until final settlement the extent of his liability cannot be ascertained.

The demurrer to this paragraph was, perhaps, sustained in the hope that a forced compliance by appellant with his contract would enable a final and satisfactory adjustment of accounts to be made between the members of the late firm. This seems a reasonable view.

There was a trial and a finding for the appellee. A judgment was rendered for the amount of the note and interest, and that the same be declared a lien upon the land. This judgment was not in proper form, as the facts stated in the complaint did not entitle the appellee to this relief, but as no exception was taken to the form of the judgment, we cannot even modify it upon appeal. If such exception had been reserved, the attention of the court below would have

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been called to this error, and a correction perhaps had without an appeal.

The judgment is affirmed, with six per cent. damages and costs.

S. P. Oyler and D. W. House, for appellant.

G. M. Overstreet and A. B. Hunter, for appellee.

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LEARD and Others v. LEARD.

DESCENTS.—Widow.—Limitation of Actions.—Petition for partition, filed January 15th, 1868, by the brothers and sisters of J. L., who died in March, 1865, seized in fee of the land sought to be partitioned, leaving a widow, the defendant, but no child or father or mother.

Held, that by the act of March 4th, 1853 (Acts 1853, p. 55), the petitioners were entitled to one undivided half of such land, but that sections 1, 2, 3, and 4 of said act, not being in conformity with the ruling in *Langdon v. Applegate*, 5 Ind. 827, were repealed by the act of March 9th, 1867, (Acts 1867, p. 204), leaving in force the provision of the act of May 14th, 1852 (1 G. & H. 296, sec. 26), that in such case the widow is entitled to the entire estate—the commencement of actions arising under the law repealed being limited to ninety days from the passage of said act of 1867, which to the petitioners was a reasonable time.

REPEAL OF LAWS.—An identification of any kind, of a law intended to be repealed, is sufficient in the repealing act.

SUPREME COURT.—Rulings of.—The inferior courts of this State are bound by the rulings of the Supreme Court till overruled by it, but the legal presumption is that, whenever properly applied to, it will correct its own errors.

APPEAL from the Delaware Circuit Court.

GREGORY, J.—The appellants, on the 15th of January, 1868, filed their petition in the court below against the appellee, for partition of real estate. The petitioners were the brothers and sisters of John Leard, who died in March, 1865, seized in fee of the lands sought to be partitioned. The appellee is the widow of the deceased. A demurrer

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was sustained to the petition, and this presents the question in the case.

In May, 1857, this court, in *Wilkins v. Miller*, 9 Ind. 100, held, that sections 1, 2, 3, and 4, of chapter 38, Laws of 1853, p. 55, were unconstitutional, following the ruling in *Langdon v. Applegate*, 5 Ind. 327. By the act of March 9th, 1867, the legislature repealed "all laws theretofore passed not in conformity with the ruling of the Supreme Court of this State in the case of Langdon against Applegate and others, reported in the 5th volume of the Indiana Reports on page 327;" and provided therein that "all actions arising out of or for a violation of any law repealed by this act, shall be commenced within ninety days from the passage of this act, and not afterwards," Acts of 1867, p. 204.

In *The Greencastle Southern Turnpike Company v. The State, on the relation of Malot*, 28 Ind. 382, this court, at the November term, 1867, overruled the cases of *Langdon v. Applegate* and *Wilkins v. Miller, supra*.

By the act regulating descents, of May 14th, 1852, the appellee is entitled to the entire estate in the lands described in the petition; but by the act of March 4th, 1853, the petitioners, as the brothers and sisters of the deceased, there being no child or children or their descendants, or father or mother surviving, are entitled to an undivided half of such lands.

It is claimed that the act of March 9th, 1867, did not repeal the act of March 4th, 1853. We hold otherwise. The repealing act embraces all laws not in conformity with the ruling in *Langdon v. Applegate*. The ruling was, that an act amending a former statute must set forth at full length the former act as it was before the amendment. It was by the force of, and in conformity to, this ruling, that the case of *Wilkins v. Miller* was decided. It is clear that sections 1, 2, 3, and 4, of the act of March 4th, 1853, were not in conformity with the ruling in *Langdon v. Applegate*, and were embraced in the repealing act.

A law may be repealed without reference to its title. An

The New Eel River Draining Association v. Durbin.

identification of any kind is sufficient. An act covering the same subject matter would repeal a former statute embraced within its provisions. The repeal of the act of March 4th, 1853, left the law of descents as it stood under the act of 1852, *supra*.

In contemplation of law the act of March 4th, 1853, was in force until repealed by the act of March 9th, 1867. The ruling in *Wilkins v. Miller* was not law. It is true that the inferior courts of this State were bound thereby until overruled by this court. But the legal presumption is that this court will decide the law as it is; that it will at any time, when properly applied to, correct its own errors. The courts were open to the appellants from the death of the intestate to assert their claim. They had ninety days from the passage of the act of March 9th, 1867, in which to do so. It cannot be said that the last named act deprived them of having a reasonable time within which to commence their action. *Ignorantia juris non excusat*. The only thing that can be urged is that the appellants were ignorant of their legal rights. The suit was not commenced in time. The court below committed no error in sustaining the demurrer.

The judgment is affirmed, with costs.

J. Brownlee, for appellants.

W. March and W. Brotherton, for appellee.

THE NEW EEL RIVER DRAINING ASSOCIATION v. DURBIN.

DRAINING ASSOCIATION.—A draining association, organized under the act of June 12th, 1852, is not a corporation until the articles of association have been in fact recorded in the recorder's office of the county or counties in which the contemplated work is situated.

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SAME.—*Assessment*.—Procuring an assessment to be made upon lands to aid in the construction of a drain is a corporate act, and cannot be legally done until after the articles of association have been recorded.

SAME.—*Practice*.—In a suit by a draining association upon an assessment, the defendant (not being a member of the association, and not having contracted with it as a corporation) may plead *nul tiel corporation* at the date of the assessment.

SAME.—*Excessive Assessment*.—The fact that an assessment, otherwise valid, is too high, will not defeat an action thereon, but only go to reduce the amount of recovery.

PLEADING.—*Defective Answer*.—A paragraph of an answer which assumes to answer the whole complaint, whilst the facts pleaded only amount to an answer to a part, is bad.

PRACTICE.—*Supreme Court*.—The Supreme Court will not reverse a judgment for overruling a demurrer to a bad paragraph of an answer, when the judgment is rendered for the defendant on the refusal of the plaintiff to reply to a paragraph which is a good bar to the action.

APPEAL from the Boone Circuit Court.

ELLIOTT, J.—Suit by the New Eel River Draining Association against Samuel S. Durbin, upon an assessment made upon the lands of the latter, to aid in the construction of a drain. Durbin filed an answer containing five paragraphs. Issue was taken on the third and fourth paragraphs, but as no question arises upon them in this court, they need not be further noticed.

The first paragraph alleges that at the time the assessment sued on was made, the articles of association of plaintiff were not recorded in the recorder's office of Boone county, wherefore there was not at the time of making the alleged assessment, any such corporation as "The New Eel River Draining Association." 2. *Nul tiel corporation* at the date of the assessment. 5. That the eighty acres of land owned by the plaintiff and described in the complaint are divided into two distinct tracts by a public highway, known as the Jamestown and Lebanon road, which runs through said land east and west, leaving about forty-one acres north, and about thirty-nine acres south of said highway; that so much thereof as lies north of the highway is upland, dry and tillable, and would not be, in any wise, benefitted by the proposed drain; that the proposed drain .

The New Eel River Draining Association *v.* Durbin.

runs through the southeast corner of that part of the tract lying south of the highway, and, if properly constructed, would benefit about twenty-eight acres of that part of the tract; that as the assessment attempts to attach a lien on that part of the tract lying north of the highway, which would not be in any manner benefitted by the drain, it is wrongful and unlawful. It is also alleged that the assessment greatly exceeds in amount the benefits which would accrue from the construction of the drain to the south part of said land, &c.

To each of these paragraphs a demurrer was overruled. The plaintiff then replied to the first paragraph, that on the 15th day of October, 1866, the plaintiff's clerk, Robert F. Prichard, left the articles of association of the company, duly signed and prepared for record, with the recorder of Boone county for record, and directed him to record them; that the plaintiff's clerk afterwards called on the recorder for them, and, on being informed by the recorder that they were recorded, took them away; that the directors of the association, in the confident belief that the articles of association had, in fact, been recorded, procured the assessment to be made; that said articles were actually recorded on the 25th of December, 1867. A demurrer was sustained to the reply, to which the plaintiff excepted. The plaintiff refused to reply further, and final judgment was thereupon rendered for the defendant. The plaintiff appeals.

It is insisted on the part of the appellant, that the court erred in overruling the demurrer to the first paragraph of the answer, and also, in sustaining the demurrer to the appellant's reply thereto.

The fifth section of the act (1 G. & H. 303) under which the appellant claims to be a corporation, provides that "the company shall cause their articles of association to be recorded in the recorder's office of the county or counties in which the contemplated work is situated, and thereafter such association shall be a body politic and corporate, by the name and style so adopted, with all the rights, inci-

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dents, and liabilities of bodies corporate," &c., and makes it the duty of the courts of the county or counties in which the articles are so recorded to take judicial notice of the existence of such corporation.

It is argued for the appellant that the execution of the articles of association makes the company, in fact, a corporation, but that the courts cannot judicially take notice of its existence, without its being specially pleaded, unless the articles are recorded. We cannot so construe the statute. As we read it, the recording of the articles of association is a condition precedent to the investment of corporate powers upon the company. The articles being recorded, then—"thereafter"—and not before, "such association shall be a body politic and corporate." The language of the statute is too plain to admit of any other reasonable construction.

Procuring an assessment to be made was a corporate act, and could not be legally done until after the articles of association were recorded, and the association thereby clothed with corporate powers. It follows, that the first paragraph of the answer, which avers that the articles were not recorded at the time the assessment was made, is a good bar to the action, and the demurrer to it was, therefore, properly overruled. The reply to that paragraph is not sufficient to avoid it. It sets up as an excuse for failing to have the articles of association recorded before the assessment was made, that they were left with the recorder by the company's clerk, who afterwards took them away, on being informed by the recorder that they were recorded, and the directors of the company so believed. This may show that the recorder was more at fault for the failure than the directors, but it does not fill the requirement of the statute, nor make the association a legal corporation prior to the time the articles were in fact recorded, and, hence, the court did right in sustaining the demurrer to the reply.

The second paragraph of the answer, we think, is good.

The New Eel River Draining Association *v.* Durbin.

The defendant was not a member of the association, nor had he contracted with it as a corporation, and was not, therefore, estopped from denying its legal existence as such at the time of making the assessment upon which he was sued. He does not deny that a corporation legally existed when the suit was brought or at the time of filing the answer, but alleges that it was not such when the assessment was made; and if the allegation be true, then, as we have seen, the assessment was without authority of law and void. The answer does not controvert the right of the association to sue in its corporate name after the articles of association were recorded, but denies the right to recover on a void assessment; and we think the second paragraph of the answer properly raises that question.

The same question, however, was directly presented by the first paragraph, and the second might have been stricken out on motion.

The act requires the appraisers to assess the benefits to each tract that would result from the construction of the drain. The assessment presented in the complaint shows a compliance with the statute in that respect. It describes the defendant's land as the east half of the southeast quarter of section 31, township 18, in range 1 west, containing eighty acres, and assesses the benefits thereto at two hundred and fifty dollars. The fifth paragraph of the answer denies that forty-one acres of the north end of the tract would be, in any wise, benefitted by making the drain, and that the assessment exceeds the amount of benefits that would result therefrom. The latter fact, if properly presented, is authorized by the statute to be shown in defense; but it is not intended by the statute that proof that the assessment is too high should defeat the action. It would only go to mitigate, or reduce the amount to the actual benefits. The only effect that could be claimed by showing that a part of the described tract would not be benefitted by the drain, would be to confine the lien in the final judgment to the part ben-

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e fitted thereby, and whether it would have that effect we need not now determine, as that paragraph of the answer is clearly defective, in assuming to answer the whole complaint, whilst the facts pleaded, at most, only amount to an answer to a part of it; and hence, the demurrer to it should have been sustained. We cannot, however, reverse the judgment for this error, as it was rendered on the refusal of the appellant to reply to the first paragraph, which we have held to be a good bar to the action.

The judgment is affirmed, with costs.

A. J. Boone, R. W. Harrison, O. S. Hamilton, and C. C. Galvin. for appellant.

C. C. Nave, S. Neal, and J. M. Butler for appellee.

HARNEY v. WOODEN and Another.

COMMON SCHOOLS.—*Special Revenue.*—School trustees, in anticipation of the actual collection of funds levied under the act of March 9th, 1867 (Acts 1867, p. 80), may employ teachers to carry on schools within the year for which the levy has been made, to be paid out of such funds when collected.

SAME.—*School Revenue for Tuition.*—The only portion of the school fund which the school trustees may not expend in anticipation is the school revenue for tuition belonging to the State, and by it apportioned.

APPEAL from the Decatur Circuit Court.

RAY, C. J.—The appellant, a tax payer, and one of the school trustees of the city of Greensburg, brought his action to enjoin the two other school trustees from contracting with certain persons as teachers, to carry on a school, from August 31st, 1868, for a term of ten months, to be paid out of the school fund. The Circuit Court refused the injunction. The only question presented for our consideration is whether the funds levied by the common council of

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the city for the year 1868, may be thus anticipated before they are actually collected.

The first section of the act "to provide for a general system of common schools," &c., approved March 6th, 1865, provides for a state tax for the purpose of supporting a general system of common schools. The second section of the act provides that the funds derived from certain sources shall be denominated the "Common School Fund," and that realized from the sale of Congressional township school lands shall be denominated "Congressional Township School Fund," and that the income from the latter, together with the taxes mentioned in the first section of the act, with the money derived from licenses for the sale of intoxicating liquor, and unclaimed fees, shall be denominated the "School Revenue for Tuition," the whole of which is appropriated and to be applied exclusively to furnishing tuition to the common schools of the State, without any deduction for the expense of collection or disbursement.

The eighth section provides that "the trustees shall keep a record of their proceedings relative to the schools, including all orders and allowances on account thereof; including, also, accounts of all receipts and expenditures of school revenue, distinguishing between the special school revenue belonging to their township, town, or city, and the school revenue for tuition which belongs to the State, and by it apportioned to their township, town, or city, which said revenue for tuition they shall not permit to be expended for any other purpose, nor even for that purpose, in advance of its apportionment to their respective corporations."

The twelfth section authorizes the trustees of the several townships, towns, and cities to levy a special tax for the construction, renting, or repairing of school houses, providing furniture, school apparatus, and fuel therefor, and for the payment of other necessary expenses of the school, except tuition. It plainly appears that the only por-

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tion of the school fund which the school trustees may not, by the express provisions of the law, expend in anticipation, is that which must be apportioned. The reason for this restriction is equally clear. Until the apportionment is made, the amount due to the school district cannot, with any accuracy, be determined. But this is not so with the special tax levied by the township, and therefore no such limitation of power is imposed.

The tax in question in this case was levied under the act of March 9th, 1867, authorizing township trustees, trustees of incorporated towns, and common councils of cities to levy a tax for school purposes. The second section of that act provides that the funds arising from such tax shall be under the charge and control of the same officers, secured by the same guarantees, subject to the same rules and regulations, and applied and expended in the same manner as funds arising from taxation for common school purposes, except that the funds are to be expended in the same civil district where they are collected. The requirement that the funds shall be expended where collected, renders inapplicable the restriction in the eighth section of the school law, that no fund shall be expended "in advance of its apportionment," for here there can be no apportionment. Nor does the reason of the limitation apply; for the amount to be raised by the city levy may be calculated with reasonable certainty, and contracts may be made within the year based upon the tax levy for school purposes for that year, although the money may not be actually collected. The complaint in this case being simply to enjoin the present application of the school fund, we do not feel called upon to discuss the constitutionality of the law authorizing the levy of taxes. The ruling of the court having been in accordance with this construction of the law, the judgment is affirmed, with costs.

J. S. Scobey and E. R. Monfort, for appellant.

C. Shane, W. A. Moore, W. Cumback, S. A. Bonner, C. Ewing, J. K. Ewing, J. Gavin, and J. D. Miller, for appellees.

Peden's Administrator v. King and Another.**PEDEN'S ADMINISTRATOR v. KING and Another.**

PLEADING.—*Omission of Christian Name.*—The omission of the Christian name of the plaintiff in the statement of a claim against a decedent's estate is only matter in abatement, and the objection may be obviated by amendment.

PRACTICE.—*Special Finding by the Court.*—To prepare a case for the Supreme Court under section 841 of the code, the court below should first state the facts in writing, and then the conclusions of law upon them, to which conclusions the party aggrieved should enter his exception.

SAME.—When the finding covers the issues, and the court has passed therein on all the facts in the case, questions of law involved in the finding are not saved by a motion for a new trial, or by a motion for judgment on the special finding.

SAME.—*New Trial*—To entitle a motion for a new trial to consideration by this court in such case, the evidence must be made part of the record by bill of exceptions.

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APPEAL from the Madison Common Pleas.

GREGORY, J.—Nichol and King filed the following claim against Peden's estate in the clerk's office of the court below: “Hiram Peden, Administrator of the estate of Joseph Peden, deceased, to O. P. Stone, Dr. To balance in error on settlement November 14th, 1865, one hundred dollars, \$100.00 Interest on the same 9½ months, 4.75

.. .. \$104.75

“O. P. STONE.

“For value received I assign the above claim to Nichol & King, August 29th, 1866.

“O. P. STONE.”

A demurrer was sustained to this claim. By leave of the court, the appellees amended as follows: “George Nichol and Amos J. King come now and amend their claim filed in said court against Hiram Peden, Administrator of Joseph Peden's estate, and make Oliver P. Stone a defendant thereto, to answer as to his interest in the assignment of the said account.”

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Stone answered, that he had no interest in the claim. The appellees, under a rule of court to make the cause of action more specific, filed the following:—"Nichol & King v. Hiram Peden, Administrator.

"Now come said plaintiffs and amend their complaint as follows, to wit: the settlement alluded to in said claim was made on the 14th day of November, 1865, for services of said Stone as deputy clerk; and also at the same time for money received by said Stone, as such deputy, in fees, and belonging to said Joseph Peden, as clerk, which settlement and account between said Stone and Hiram Peden, as administrator, showed that there was in Stone's hands at that date \$279.69, money belonging to said Joseph Peden in fees, and that there was a balance due said Stone for services aforesaid, the sum of \$922.44; the error complained of is, that the amount allowed in said settlement to said Stone was \$822.44, when the amount should have been \$922.44; said sum of \$100.00 was omitted by mistake."

The appellant answered: first, general denial; second, set-off for money had and received by Stone of the deceased in his life-time; third, substantially the same as the second. The plaintiffs replied by the general denial. Trial by the court. There was a special finding for the plaintiffs.

There was an attempt in the court below to raise a question of law by the finding, by a statement therein that the several sums claimed as a set-off were "received by Stone as deputy clerk, of fees paid into the clerk's office, some of which were receipted for in the name of Joseph Peden, clerk, by Stone, deputy, whilst others were receipted for by Stone alone as deputy clerk; no other evidence as to who got the money; all of which credits of fees on the fee books are in the hand writing of Stone. Now, if the amounts thus received and receipted for are proper charges against Stone, then the finding should be for the defendant, if not, then it should be for the plaintiffs, and the court believing they are not proper charges against Stone, having been made in the

Berry and Another *v.* Daily.

discharge of a duty as deputy clerk, the finding is for the plaintiffs."

Motions were made for a new trial, and for judgment on the special finding, which were overruled. The evidence is not in the record. It is claimed that the suit ought to have been in the Christian as well as the surnames of the appellees. There is nothing in this objection. If it was true that the Christian names of the plaintiffs were omitted in the statement of the claim, it would be only matter in abatement. But, as we understand the record, this objection was obviated by the amendment.

To prepare a case for this court under section 341 of the code, the court below should "first state the facts in writing, and then the conclusions of the law upon them," to which the party aggrieved enters his exception. When the finding covers the issues, and the court has passed on all the facts involved in the case, the question is not saved by a motion for a new trial, or for judgment on the special finding.

To entitle the motion for a new trial to consideration, the evidence in such a case must be made a part of the record by bill of exceptions. The statement in the special finding presents no question for this court.

The judgment is affirmed, with costs.

J. W. Sansbery, for appellant.

M. S. Robinson, for appellees.

BERRY and Another *v.* DAILY.

PRACTICE.—*New Trial after Term.*—Complaint under section 356 of the code for a new trial of a cause wherein husband and wife were plaintiffs. One paragraph of the complaint in the original proceeding counted on a cause of action belonging to the wife, for which she might have sued alone, or, as she did, jointly with her husband.

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Held, that the application should have been by both plaintiffs, and being so, that the complaint was insufficient for not averring that the newly discovered evidence was not fully known to the husband at the time of the previous trial, but merely alleging that the wife had since discovered it.

APPEAL from the Clark Circuit Court.

FRAZER, J.—This was a complaint for a new trial under the statute, on account of newly discovered evidence. The new trial was sought of a cause in which the present appellants (husband and wife) were plaintiffs, and the appellee was defendant. It is assigned for error that the court below sustained a demurrer to the complaint. The second paragraph of the complaint in the original cause counted on a cause of action belonging to the wife, and for which she might have sued alone, or jointly with her husband, as she did. The complaint for a new trial does not aver that the newly discovered evidence was not fully known to the husband at the time of the previous trial, but merely that the wife has since discovered it. It was therefore clearly insufficient and liable to demurrrer.

There is some uncertainty as to whether the complaint for a new trial was by both husband and wife or by the wife alone. It should have been by both, and seems to have been so construed in the court below and by the parties, and we have so treated it, though we do not so decide.

Judgment affirmed, with costs.

J. H. Sotsenburg and T. M. Brown, for appellants.

T. W. Gibson and J. Morrison, for appellee.

Wright v. Yetts.

WRIGHT v. YETTS.

SHERIFF's SALE.—*Sale in Parcels.*—Where real estate occupied as separate parcels is sold on execution as an entirety, without being first offered in parcels, the fact of such occupation being known to the sheriff and the purchaser, the sale cannot be sustained.

SAME.—*Official Discretion.—Fraud.*—Where there is no actual division of the property, and the question of its susceptibility of division must be determined by the sheriff, if there may be an honest difference of opinion, the conclusion reached by the officer must be final—unless his action operate as a fraud upon the execution defendant or his creditors, it cannot be reviewed.

APPEAL from the Kosciusko Circuit Court.

RAY, C. J.—This case was ejectment by the appellee against the appellant to recover lot numbered 120, in the town of Warsaw. The defendant answered by general denial.

There was a trial of the cause, resulting in a finding and judgment for the plaintiff. A new trial was granted on the payment of costs by defendant within less than one year from the date of the first judgment. There was a second trial at the January term, 1868, resulting in a finding and judgment in favor of the plaintiff. The evidence is in the record by a bill of exceptions. It was admitted in an agreement of facts filed in the case that the title to the premises was in the plaintiff, unless the same had been divested by virtue of a certain sheriff's sale and deed of conveyance made in pursuance thereof to the defendant Wright. At the request of the defendant below, the court, trying the cause without a jury, made a special finding of facts, as follows:—"The plaintiff, on the 1st day of November, 1859, was the owner of the lot in controversy, and is still the owner, unless he has been divested of his title therein by virtue of a sheriff's deed executed by the sheriff of said Kosciusko county, upon a sale of said lot on an execution issued upon a judgment, as set forth in the finding; that on the 1st day of November, 1859, Peter

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Snyder recovered a judgment in the Court of Common Pleas of said county against said Yetts, for the sum of seventy-five dollars and eight cents, and seven dollars and forty-seven cents costs, which said judgment was without relief from valuation and appraisement laws, upon which judgment twenty-eight dollars had been paid before execution, leaving a balance due of seventy dollars and seventy-five cents at the date of the sale of the lot; that on the seventh day of December, 1861, an execution was duly issued upon said judgment and delivered to the sheriff of said county, who duly levied the same upon said lot, and duly advertised the same in all things as required by law; that on the 4th day of January, 1862, the day fixed in the notice of said sale, the sheriff of said county between the hours of the day prescribed by law, at public outcry sold said lot to the defendant, for the sum of three hundred and fifty dollars, which sum was duly paid by said purchaser to the said sheriff; that on the 6th day of April, 1862, said sheriff executed and delivered to said Wright a deed of conveyance for said lot; that at the time of said sale, the sheriff duly offered the rents and profits of said lot for sale for a period not exceeding seven years, and that failing to receive any bid therefor, he then offered for sale and sold the fee simple of the entire lot, and sold the same to said Wright as aforesaid; that said sheriff did not offer said lot in parcels, but treated the same as not being susceptible of division; that at the time of said sale there was a lien on said lot for the sum of —— dollars and —— cents for taxes duly and properly chargeable thereon; that said lot is situated on the northwesterly corner of High and Market streets in said town of Warsaw, and that it is eight rods long by four rods wide; that the same fronts four rods on High street, and eight rods on Market street; that by a line drawn through the centre of said lot from north to south, the same would embrace two parcels four rods square; the east parcel would have a front on High street of four rods and a front on Market street of four rods; the west parcel

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would face four rods on Market street and abut on the west on an alley sixteen feet wide. On the west parcel is no building, but it is enclosed by a plain board fence. Upon the east parcel there is a dwelling house, fronting on Market street, and standing near the southeast corner of said parcel. The entire lot was worth one thousand dollars at the time of the sale. Divided into two parcels in the manner above described, the west parcel was at the time of the sale worth the sum of three hundred dollars; and the east parcel was, at the same time, worth the sum of six hundred dollars; that said Yetts was not present at the time of the sale, and had not actual notice of it; that he has not received any of the money arising from the sale, but the surplus thereof remains in the hands of the proper officer; that Wright afterwards paid said tax lien existing against said lot, and took possession soon after his purchase, and has ever since kept the plaintiff out of the possession of the same; and that the rents of said premises for the time the plaintiff has been so kept out of possession, are of the value of three hundred dollars."

From the facts so found the court deduced the following conclusions as matters of law, to wit: "That the sale made by the sheriff, of the said lot, was void, for the reason that no part of said real estate was offered for sale by said sheriff; that said lot was at the time of said sale susceptible of division, and should have been offered in parcels; and that the entire lot should not have been offered for sale, until a portion of said lot had first been offered for sale; and that the defendant, having kept the plaintiff out of possession of said lot without right, is liable to pay for the use thereof." Then follows the judgment for the plaintiff in the usual form.

The defendant below, claiming that the finding of the court on the facts of the case was defective, moved for a *renire de novo*, which was overruled, to which he excepted; and he brings the evidence before this court by a bill of exceptions. He also excepted to the conclusions of law

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drawn by the court from the facts as found. He then moved for a new trial, which motion was overruled, and he excepted.

The question made in the case is, was the sheriff's sale of the lot in controversy to Wright void, because the entire lot was sold without being first offered in parcels? The appellee makes no other attack upon the title of the appellant. The section of the statute which must control the decision in this case is as follows: "If the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale, than shall be necessary to satisfy the execution, unless the same is not susceptible of division." 2 G. & H. 249, sec. 466.

Where, as in the case of *Callett v. Gilbert*, 23 Ind. 614, the property sold as an entirety was occupied as two separate parcels, and this fact was known to the sheriff and the purchaser, there can be no serious doubt that the sale cannot be sustained, for the express letter of the statute has been disregarded. But where there is no actual division of the property, and the point must be determined by the sheriff, whether or not the same is susceptible of division, a more difficult question is presented, and one requiring the exercise of official discretion. Upon the conclusion reached, the sheriff must base his official action, and unless that action operates as a fraud upon the execution defendant or his creditors, it cannot be reviewed by the court. The statute commits to the judgment of the officer the solution of the inquiry whether the property can be divided or not, and upon a reasonable exercise of this judgment the purchaser has a right to rely. Wherever there may be an honest difference of opinion, the conclusion reached by the officer must be final.

In the case before us it is insisted that the finding of the court omits facts rendered material by the evidence, and that the facts found do not show an abuse of official discretion by the sheriff, and that the finding is not sustained by

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the evidence. These points are all presented by the motion for a new trial. *Schmitz v. Lauferty*, 29 Ind. 400.

The return to the execution shows that there were other executions in the sheriff's hands which were liens upon the property sold. It also very clearly appears that the lot was peculiarly suitable for residence property, and for its use in that manner, it was desirable it should remain as one piece or parcel of land. It is true that some of the witnesses testify that the property might have been divided, and one part used for a livery stable or blacksmith's shop and the other portion for a residence, and the value of the entire property would have been injured only to the extent of from \$100 to \$300. But there are other witnesses who consider the use of a part for the purposes of a shop or stable as destructive of the value of the remainder as a residence site. But if it be admitted that the evidence sustains the finding of the court, and that the conclusion of law thereupon, that the property was susceptible of division, is correct, still there is nothing in either the evidence or the finding authorizing the conclusion that the sheriff had acted in bad faith or had abused the discretion confided to him by law. Nothing short of such proof can justify the court in disregarding the sale, where it is otherwise unobjectionable.

The judgment is reversed, and the cause remanded for a new trial. Costs here.

FRAZER, J., having been of counsel, was absent.

G. W. Frasier, for appellant.

J. L. Worden and J. Morris, for appellee.

Hiatt's Executrix v. Hiatt.

HIATT'S EXECUTRIX v. HIATT.

DECEDENTS' ESTATES.—*Set-off.—Judgment.*—Pending the settlement of a decedent's estate, a court not having the probate jurisdiction thereof cannot set off a personal judgment held by a debtor to the estate against a legatee, in satisfaction of a judgment in favor of the estate against such debtor.

APPEAL from the Grant Common Pleas.

FRAZER, J.—Elam Hiatt was the plaintiff below, and Esther was the defendant. The facts shown by the complaint are, that the defendant is the executrix of Nathan Hiatt, deceased, and the legatee of his whole estate remaining after the payment of debts and expenses; that said executrix, as such, holds a judgment of the Grant Common Pleas against the plaintiff for \$1,883.76; that the plaintiff holds a personal judgment of the same court against Esther for \$2,068.28, both judgments remaining in force; that the defendant has no property or effects in this State out of which any part of the judgment against her can be made; that the defendant is about to collect by execution the judgment against the plaintiff, with the intention of taking the proceeds to the State of Iowa, where she resides; that the sum of two hundred dollars will satisfy all the debts of Nathan, deceased, and pay the expenses of settling his estate, which sum the plaintiff brings into court, and also the costs accrued against him. The relief sought was a satisfaction of the balance of the judgment against the plaintiff, by set-off of so much of the judgment held by him against Esther. A demurrer to the complaint was overruled, and this presents the only necessary question before us.

In passing upon the sufficiency of the complaint, force may be given to the opinion which we hold, by the facts of this very case as subsequently proven upon the trial. The letters testamentary to the defendant had been issued

Hiatt's Executrix *v.* Hiatt.

by a court in Iowa, before which the settlement of Nathan's estate was pending.

The judgments sought to be set off were not held by the parties, each against the other, in individual right. The settlement of Nathan Hiatt's estate belonged to another court, and the plaintiff could not, by his complaint, bring that subject within the jurisdiction of the Grant Common Pleas, nor could any judgment of the latter court bind the court in Iowa or the creditors of Nathan, deceased. The court having the matter of probate before it must, while it had control of that matter, proceed to the end, notwithstanding any claim of the plaintiff against the legatee. The court here, in determining this cause, could not be informed by proof, or otherwise, that a single dollar of Nathan's estate would ever come to Esther, as legatee. In short, it did not appear by the complaint that she had any interest in the judgment sought to be satisfied. It was a fund required by law for other purposes than her individual uses; and until those other purposes were actually satisfied, and the residue ascertained by the Iowa court, no other court could say that she had, individually, any personal interest in that fund. No court could, except in the exercise of probate jurisdiction, seize upon the funds of Nathan's estate, under such circumstances, and apply them to the satisfaction of an indebtedness owing by the legatee of Nathan. The demurrer should have been sustained, we think.

The judgment is reversed, with costs, and the cause remanded, with directions to sustain the demurrer to the complaint.

J. Brownlee, for appellant.

A. Steele and R. T. St. John, for appellee.

Hellenkamp v. The City of Lafayette.

30	192
128	588
30	192
134	557
30	192
138	139
30	192
159	159
30	192
171	296

HELLENKAMP v. THE CITY OF LAFAYETTE.

COMMON COUNCIL.—*Precept.—Appeal.*—No question involving the power of the common council of a city to make a contract for street improvement under an order to that effect, can be made on appeal from a precept.

SAME.—If there has been an order of the council, and a contract under it, the only questions to be determined on such appeal are, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon.

SAME.—*Modification of Contract.*—Where the common council, by a two-thirds vote, without petition from the owners of property along the line of a street, has ordered the improvement of such street, to be of specified material and quality, and has approved a contract duly made for such improvement, it may, before commencement of the work, acting in good faith for what it believes to be the best interest of the city, with the consent of the contractor, modify such contract, so as to reduce the quality and quantity of material to be used and the price to be paid. Such modification becomes a part of the contract, and cannot be questioned on appeal from a precept.

CITY.—*Powers.—Estoppel in Pais.*—A property holder cannot quietly permit money to be expended in work which benefits his land, under a contract with a city, and then deny the power of the city to make the contract.

ANSWER.—*Costs.*—Appeal from precepts issued on assessments for a street improvement. Answer, directed to the entire transcript, but presenting a defense to only a part of the sum for which the last precept issued.

Held that the answer was bad on demurrer.

Held, also, that the answer should have been directed to the last estimate, and if on that issue the appellant had recovered, he would have been entitled to his costs on such issue.

APPEAL from the Tippecanoe Common Pleas.

RAY, C. J.—The common council of the city of Lafayette, in the year 1865, without petition from the owners of property along the line of Cincinnati street, by unanimous vote, ordered the grading, graveling, and paving of said street, and directed specifications of the work and material required therfor to be prepared, and the work advertised for contract. This having been done, a contract was made and approved by the council. Before any work had been done under the contract, a resolution was adopted reducing the quality and quantity of material to be used in executing the contract, and the contract price to be paid; the modification

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requiring the consent of the contractors, to whom the city was already bound. The modification was accepted by the contractors, and the work performed under it, and three assessments, including a final one, ordered by the council. From precepts issued on these three assessments, against the appellant, he appealed to the Court of Common Pleas. In that court he filed a demurrer to the transcript, which demurrer was overruled. It is objected here, that the city council had no power to modify the contract, and that no compensation can therefore be collected for the work done under the contract as finally carried out. In other words, where no improvement was asked for by a majority of the property holders along the line of a street, but the council, looking to the interest of the entire city, determined, as they had the power to do, that such improvement was required, and thereupon by a two-thirds vote ordered it to be done of a certain material and quality and approved a contract for such improvement duly made, that all power in that regard thereupon passed from the hands of the council. It may be discovered before the work commences that the improvement is in its nature more expensive than the interests of the city require, and yet it is contended that the city council, acting in good faith for what it believes to be the best interest of the city, may not, with the consent of the contractor, modify the contract so as to reduce its cost.

It is provided by section 69 of the act "for the incorporation of cities," 1 G. & H. 235, in force when this contract was made, that upon appeal "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement, under the order of council. * * * and in case the court or jury shall find, upon trial, that the proceedings of said officers, subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct

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the said property to be sold, * * * *Provided*, that nothing herein shall be so construed as to prevent any person from obtaining an injunction upon the proceedings prior to the making of any such improvements." This prevents any question being made on appeal involving the power of the council to make the contract under an order to that effect. That power may not have been acquired, owing to the omission of some steps required, or having been acquired, it may have been forfeited, or the power exhausted by its full exercise, as it is claimed had occurred in this case; still if there be an order of the council, and a contract under it, the only questions to determine are "that the work has been done, in whole or in part, according to contract, and that the estimate has been properly made thereon."

A property holder cannot quietly permit money to be expended in work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract. *Palmer v. Stumph*, 29 Ind. 329.

The modifications of the contract, under the order of the council, before the work was commenced, became a part of the contract, and cannot be questioned on appeal. The first paragraph of the answer filed by the appellant states the change made in the contract as a ground of defense. To this a demurrer was properly sustained.

The second paragraph states that by the terms of the contract, if any extensions of time were made, a specified sum was to be deducted from the contract price; that such extensions were made and a sufficient sum was not deducted.

The third paragraph states that the city engineer refused to make the third and final estimate and accept the work. Demurrers were sustained to each.

These paragraphs were filed as answers to the transcript, which the statute declares shall be treated as a complaint. It is evident that they can in no case be good, except as to a part of the sum for which the last precept issued. They do not answer the entire complaint.

The pleas should have been directed alone to the third

Fewell and Others v. Kessler.

estimate, and if upon that issue the appellant recovered, he would have been entitled to his costs on that issue. 2 G. & H. 228, sec. 400. The ruling of the court was correct.

The judgment is affirmed, with ten per cent. damages and costs.

R. P. Davidson and W. D. Wallace, for appellant.

W. C. L. Taylor and W. C. Wilson, for appellee.

FEWELL AND OTHERS v. KESSLER.

30	196
155	364
155	500

MORTGAGE — Foreclosure.—Judgment.—A note secured by mortgage on real estate was surrendered, and the mortgage satisfied of record by the mortgagor, upon the representation of the mortgagor that he had conveyed the mortgaged property to a third person, from whom the mortgagee thereupon accepted a new mortgage on said real estate for the debt.*

Held, that the deed from the original mortgagor to such third person, the parties thereto being satisfied that it should stand, could not be disturbed at the instance of the mortgagee, seeking to revive and foreclose the first mortgage.

DEED.—Delivery of.—The parties to a deed of conveyance of real estate had it prepared, and agreed that it should be signed and acknowledged and left with a justice of the peace for the grantee, all of which was done.

Held, that there was a good delivery of the deed.

APPEAL from the Jefferson Common Pleas.

FRAZER, J.—This case presents some novel features, and some questions which are quite plain and easy of solution. Kessler sued Sandford Fewell and wife, Troup and wife, and Elizabeth Fewell, alleging in his complaint that Sandford and Elizabeth Fewell had made to him their promissory note, overdue when the suit was brought, for seven hundred dollars, and a mortgage to secure it, on eighty acres of land, in which Fewell's wife had joined; that subsequently the note was surrendered to Fewell, and the mortgage satisfied of record, in consequence of representations

Fewell and Others v. Kessler.

by the Fewells that Sandford had conveyed forty acres of the land mortgaged, to Troup, and by promising that Troup owed Sandford for said land more than seven hundred dollars, and that Troup would make his note to the plaintiff for the indebtedness from the Fewells to the plaintiff, and a mortgage on the land so sold to Troup and another tract owned by Troup; that in fact Fewell never conveyed the forty acres to Troup, nor was the latter indebted to Fewell, as represented; that Troup executed to the plaintiff the new mortgage, as had been agreed, but no note; that Troup has no title to the forty acre tract which Fewell was to have conveyed to him; that the other tract embraced in Troup's mortgage to the plaintiff was and is incumbered to its full value, though Troup and the Fewells represented that it was not incumbered, and the plaintiff knew nothing of such incumbrances. A foreclosure of the original mortgage from Fewells was prayed, that the release thereof be set aside, &c. The mortgage by Troup was brought into court, to be cancelled as the court should direct. Issues were formed, and the cause tried by the court. There was a special finding of facts and conclusions of law thereon, and a judgment foreclosing the Fewell mortgage, cancelling the Troup mortgage, and cancelling and setting aside a deed from Fewells to Troup for the forty acres, though both those parties resisted. It ought to be well understood that if Fewell and Troup were satisfied that the deed from the former to the latter should stand, the court had no authority, at the plaintiff's instance, to disturb it. The court found from the evidence, that that deed had never been delivered, though the proof was that the parties to it had had it prepared, and had agreed that it should be signed and acknowledged, and left with a justice of the peace for Troup, all of which was done. Nothing is plainer in the law than that such facts constitute a good delivery of a deed. It was controverted by the answer that Troup was to have given a note to the plaintiff for the Fewell indebtedness, and upon that subject there was evidence in the

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negative as well as the affirmative, and the court found it in the affirmative. This, however, cannot save the judgment below. For the reasons already stated, there must be a new trial.

There has been some controversy here about two bills of exceptions, and the power of the court below to put the second of these upon the record. This point is wholly immaterial to the question upon which the case turns, as both bills are, as to that, substantially alike. It may, however, be said with propriety, that the facts before us entirely acquit counsel of dishonorable proceedings concerning these bills.

The judgment is reversed, with costs, and the cause remanded for a new trial.

E. R. & J. L. Wilson, for appellants.

H. W. Harrington and C. A. Korby for appellee.

EX PARTE MOORE.

MURDER.—*Habeas Corpus.—Bail.—Appeal.*—On appeal from the refusal of a judge to admit to bail a prisoner committed on a charge of murder, the Supreme Court will weigh the evidence and determine the facts, as if trying the case originally.

SAME.—*Malice.*—Where one person unlawfully and purposely kills another, malice, in the absence of rebutting evidence, is presumed from the act; but where no express malice is shown, and it appears that the act, though voluntary, was the result of a sudden heat, or transport of passion, upon a sufficient provocation, it rebuts the presumption of malice, which is an essential ingredient of the crime of murder in the first or second degree, and reduces the offense to manslaughter.

SAME.—*The crime of murder requires the mind to have acted from deliberation and intelligence, and where it is clouded by passion, the result of a sufficient provocation, the killing is no more than manslaughter.*

SAME.—*Evidence.*—On an application by a person charged with murder in

30	197
137	93
30	197
147	99
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1170	656

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the first degree to be admitted to bail, it appeared in evidence that the prisoner and the deceased, being friends, between whom there had been no previous difficulty, met in a saloon, where they engaged in playing cards and drinking beer until they both became intoxicated and fell into a dispute on politics, which resulted in coarse and abusive language between them, and the prisoner became excited and angry, and, leaving the card table, said he would go home, and attempted to go out, when the deceased, much the stronger man, perpetrated repeated personal violence and indignity upon the prisoner (who several times attempted to go away), sufficient to inflame his passion, and provoke him to extreme anger; that the prisoner, thus provoked and greatly excited, escaping, at length, from the deceased, hastened to his own house, a short distance, and, not being absent from the saloon more than five minutes, returned with a revolver in his hand, with which he immediately shot and killed the deceased.

Held, that it was not clear that there was sufficient time between the provocation and the act for passion to cool and reason to resume control, or that the proof was evident or the presumption strong that the killing was malicious.

APPEAL from the Judge of the Floyd Common Pleas.

ELLIOTT, J.—Moore was arrested and committed to jail by a justice of the peace, on a charge of murder in the first degree, for the killing of one Sinex, and sued out a writ of *habeas corpus* for the purpose of being let to bail. After the service of the writ, and before the final hearing, Moore was indicted in the Floyd Circuit Court for the same offense. The question presented to the judge, on the return of the writ, was whether the proof was evident and the presumption strong that the prisoner was guilty of murder. The judge refused to admit the prisoner to bail, and dismissed the writ on the evidence, from which the prisoner appeals to this court.

The only question presented here is, whether the proof of the prisoner's guilt is so clear, or the presumption so strong, as to render the offense a non-bailable one.

The facts disclosed by the evidence are, substantially, as follows: The prisoner and the deceased were both residents of the city of New Albany, and were friends, no trouble or difficulty having previously existed between them. On the day of the difficulty, which resulted in the death of the

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deceased, they met at a saloon in the city of New Albany, called the Belvidere, where they engaged in playing cards and drinking beer until they both became intoxicated. They differed in politics, and finally got into a dispute on that subject, and in reference to the battle of Pittsburgh Landing, which resulted in coarse and abusive language between them, and the prisoner became excited and angry. He left the card table, and said he would go home. The deceased insisted that he should not go, and asked him to drink with him, and settle the difficulty, which the prisoner refused to do, and started to go out. The deceased—who was much the stronger man—thereupon seized hold of the prisoner, when a scuffle ensued between them, the deceased forcing the prisoner into a chair, and insisting that he should not go until they had another drink. The prisoner again refused to drink with the deceased, and bid him to let him alone. He again started to leave, but the deceased caught him a second time, and in a very rough manner forced him back. The prisoner got away again from the deceased, and started to leave through the front room of the saloon, but was followed by the deceased, when the prisoner called on persons present to take notice that he demanded of the deceased to let him alone, and proceeded towards the front door, but the deceased followed him, and caught hold of him just as he had reached a screen that stood across the doorway, near the door. A scuffle ensued between them, when the prisoner, in attempting to jerk away from the deceased, partially fell and knocked down the screen, which lodged without falling entirely down, but leaving the prisoner under it. The deceased then caught him by the legs, and attempted to draw him back into the room, but he kicked loose, and as he was crawling out to the doorway the deceased kicked at him, but whether he hit him or not, the witnesses could not tell. The prisoner then left, much excited. Persons in the saloon who saw the difficulty, and knew the prisoner, and saw that he was intoxicated and excited, told the deceased that he would

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return, and earnestly insisted that the deceased should leave the saloon, to avoid further difficulty; but he refused to do so, insisting that there was no danger that the prisoner would attempt to do him any harm. The prisoner lived but a short distance from the saloon. He walked hurriedly home, and very soon came out of the house with a revolver in his hand; he returned rapidly to the saloon (some of the witnesses testify that he ran), still holding the revolver in his hand, and as soon as he entered the saloon and saw the deceased, who was standing at the counter, he drew, and fired the shot which resulted in the death of the deceased. The evidence further shows that the period intervening, from the time the prisoner first left the saloon until his return, when he shot the deceased, did not exceed five minutes. It was also proved that intoxication had the effect on the prisoner to excite his passions, and greatly impair his reason. Soon after he left the saloon, after shooting the deceased, it was noticed that the side of the prisoner's face and neck were scratched and bleeding, and the marks on the neck resembled finger prints.

We held in *Ex parte Heffren*, 27 Ind. 87, that in this class of cases, it was proper that we should weigh the evidence, and determine the facts, as if trying the case originally.

To constitute the offense of murder, either in the first or second degree, malice is an essential ingredient. It is true, that where one person unlawfully and purposely kills another, malice, in the absence of rebutting evidence, is presumed from the act. But when no express malice is shown, and it appears that the act, though voluntary, was the result of a sudden heat, or transport of passion, upon a sufficient provocation, it rebuts the presumption of malice, and reduces the offense to manslaughter.

Here, it appears that no quarrel or difficulty existed between the prisoner and the deceased prior to their controversy in the saloon, just preceding the fatal act. The personal violence and indignity perpetrated by the deceased on the accused, and so often repeated, were certainly suffi-

Ex parte Moore.

cient to inflame his passion and provoke him to extreme anger; and such was the result; and if, in that transport of passion, thus provoked, the prisoner had immediately drawn a deadly weapon, and killed the deceased, it would hardly be claimed that the offense was murder. It would, at most, have amounted to manslaughter only. But the act did not immediately follow the provocation; and the question to be determined is, did sufficient time intervene between the provocation and the fatal act, under the circumstances of the case, for passion to subside and reason to interpose? The time necessary for cooling has never been defined or made absolute by rule; indeed, it could not, in justice, be so made. Each case must stand upon its own merits, as affected by its own particular circumstances. If two men fall out in the morning and fight in the afternoon, and one of them is slain, it is said to be murder, because in such a case there would seem to be ample time for the passions to cool, and reason to resume its sway. And so, in a given case, an hour has been deemed sufficient cooling time; see 2 Bishop's Crim. Law, § 641. It is said by the same author (§ 630) that "the crime of murder requires the mind to have acted from deliberation and intelligence; and, where it is clouded by passion, the killing is only manslaughter." This must be understood, however, with the qualification that the passion is the result of a sufficient provocation.

Applying these rules to the facts of the case under consideration, and in view of the provocation given by the deceased, the high state of excitement and passion produced upon the mind of the prisoner thereby, the hasty manner in which he went to his house and returned to the saloon with the pistol, and the short period of time, not exceeding five minutes, that intervened between the provocation and the act, and it seems to us that it cannot be fairly said that it is clear that there was sufficient time between the provocation and the act for the passion to cool and

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reason to resume control, or that the proof is evident, or the presumption strong, that the killing was malicious.

We think, therefore, that the prisoner is entitled to be let to bail.

The judgment is reversed, and the cause remanded, with directions to the judge of the Court of Common Pleas to let the prisoner to bail in such sum as may be deemed proper to secure his presence to be tried on the indictment in the Circuit Court.

J. S. Davis and D. C. Anthony, for appellant.

D. E. Williamson, Attorney General, for the State.

PILCHER and Another v. FLINN.

LIMITATION OF ACTIONS.—*Fraud*.—The statute providing that actions for relief against frauds must be commenced within six years after the cause of action has accrued (2 G. & H. 156, sec. 210), greatly changes the law as it existed when *Raymond v. Simonson*, 4 Blackf. 77, was decided. It applies as well to suits in equity as at law; and under it time begins to run before discovery of the cause of action, unless the defendant shall conceal his liability.

APPEAL from the Grant Circuit Court.

FRAZER, J.—Flinn sued Amaziah Pilcher and Jane R., his wife, for deceit, as we understand it, alleging in his complaint, a conveyance to Jane R., in March, 1858, of certain real estate in Grant county, in consideration of one thousand dollars in promissory notes, and the assignment by her to the plaintiff of a title bond, given by one Harlan, conditioned for the conveyance to her of a tract of land in Iowa. It was averred that, to obtain the conveyance from the plaintiff, the defendants "fraudulently represented that Harlan owned the Iowa land in fee, and had good right and lawful authority to sell and convey the same and would con-

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vey the same to the plaintiff at any time when requested, * * and that the plaintiff, relying on said representations, accepted said Harlan's bond as and for one thousand dollars of the purchase money for the realty conveyed to said Jane R.;" that said representations were untrue; that Harlan did not own the Iowa land, and could not convey the same, which did not become known to the plaintiff until after August, 1864.

The appellee in argument has treated the suit as founded upon contract, but it is very clear that in that view the complaint would be bad against Jane R., for the reason that she is alleged to have been a married woman, and could not, therefore, bind herself by the contract. The complaint, if good at all, must be regarded as making an action on the case for fraud and deceit. As to the sufficiency of the complaint, viewed in this light, we are in some doubt, and we are not aided by any argument upon the question. It is not now decided, for the reason that it has not been argued, and for the further reason that the case can be otherwise finally disposed of.

The fifth and seventh paragraphs of the answer, the former by the wife, and the latter by the husband, averred that the cause of action did not accrue within six years next before the suit was commenced. To the fifth paragraph a demurrer was sustained, and to the seventh a demurrer was overruled, and a reply of general denial was then filed to it. The proof fully sustained the paragraph, but there was, nevertheless, a general finding for the plaintiff.

As the fifth and seventh paragraphs of the answer, pleaded separately by the defendants, were exactly alike, it is not easy to perceive why the former should have been held bad and the latter good. It is due to the intelligent judge who presided below to say that probably the record before us does not accurately show what was really done.

But we must act upon the record as it comes to us. We have a plain statute enacting that actions for relief against frauds must be commenced within six years after the cause

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of action has accrued. 2 G. & H. 156, sec. 210. This statute greatly changes the law as it existed when *Raymond v. Simonson*, 4 Blackf. 77, was decided. It applies as well to suits in equity as at law. Under it, time begins to run before discovery of the cause of action, unless the defendant shall conceal his liability. 2. G. & H. 162, sec. 219; *Boyd v. Boyd*, 27 Ind. 429.

In *Matlock v. Todd* 25 Ind. 128, we made some remarks, not actually necessary to that case, not quite in harmony with the present ruling. When that case was before us our attention was not called to all the provisions of the present statute of limitations.

The judgment is reversed, with costs, and the cause remanded, with directions to set aside all proceedings subsequent to the filing of the demurrer to fifth paragraph of the answer, and to overrule that demurrer.

J. Brownlee, for appellants.

A. Steele and R. T. St. John, for appellee.

SPARKS and Another v. CLAPPER.

[30 204
138 688]

PLEADING.—*Departure*.—Suit on promissory note. Answer, alleging payment of a certain amount of illegal interest and seeking to reduce the recovery that much. Reply, that such payment was made under a subsequent written contract to pay that rate.

Held, that the reply was not a departure.

INTEREST.—*Statute Construed*.—*Constitutional Law*.—The change in the interest law by the act of 1867 did not impair the obligation of a contract, but enabled parties to a contract previously voidable to avail themselves of the provisions of the new law, and validated their acts done in accordance therewith.

APPEAL from the Morgan Common Pleas.

RAY, C. J.—This was an action commenced in the Janu-

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ary term of the Morgan Common Pleas, 1868, by George W. Clapper, appellee, against William J. Sparks and Charles D. Smith, appellants, upon a promissory note executed by appellants, on the 27th day of October, 1864, and made payable to appellee two years after date, for \$1,779 with interest, which said note was secured by mortgage upon real estate.

Appellants answered in five paragraphs, all of which were subsequently withdrawn, except the fifth.

The fifth admitted the execution of the note and mortgage, but alleged the payment of usurious interest thereon, to wit, \$17.79 per month, from the 8th day of January, 1867, to the 8th day of October, 1867, inclusive, the same being at the rate of twelve per cent., which sum of \$17.79 was paid by appellants to appellee on the 8th day of each month from said 8th day of January to the 8th day of October; wherefore appellants asked to recoup the usurious interest so paid.

Appellee replied in four paragraphs, the second and third of which were subsequently withdrawn. The first paragraph of appellee's reply was a denial. The fourth paragraph of the reply admitted the receipt of the usurious interest, as set out in appellants' answer, except the last payment, to wit, \$17.79 due from the 8th day of September to the 8th day of October, 1867; but further alleged that on the —— day of January, 1867, appellants executed to appellee their written contract, by which they agreed to pay appellee \$17.79 per month from the 8th day of January, 1867, to the 8th day of September, 1867, as interest upon said note, in consideration of appellee agreeing to forbear suing upon said note until the 8th day of September, 1867, which interest was at the rate of twelve per cent., and was to be paid promptly at the end of each month. To this fourth paragraph of appellee's reply appellants demurred, the demur-
rer the court overruled, to which ruling and opinion of the court appellants at the time excepted.

The cause was submitted to the court for trial upon the

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issues presented by the fifth paragraph of appellants' answer. Appellants, to sustain the issues on their part, introduced the appellant William J. Sparks, as a witness, who testified that he agreed to pay appellee twelve per cent. interest upon the note sued on, the same being \$17.79 per month; that he paid said interest monthly, in pursuance of the agreement to pay at the end of each month, from the 8th day of January 1867; that he continued to pay said interest regularly, at the end of each month, for four or five months; that he then let appellee have flour to be credited upon said interest; that he settled with appellee about the 4th day of November, 1867; that in said settlement he allowed appellee, upon said interest, seventy-one dollars. Could not state positively whether he paid said twelve per cent. interest up to the 8th day of October, or only to the 8th day of September, 1867; that the agreement referred to was in writing, and was made in January, 1867. Agreement exhibited to him (being agreement or contract set out in fourth paragraph of reply) was the agreement referred to; that when he settled with appellee, he asked him for a receipt for the interest paid, which for some cause appellee refused to give. This was all the evidence introduced by appellants.

Appellee, to sustain the issues upon his part, offered in evidence the written agreement set out in fourth paragraph of reply, to the introduction of which agreement in evidence appellants at the time objected, which objection the court overruled, to which appellants at the time excepted. Appellee was sworn, and testified that under the agreement, appellants paid him eight payments of interest, paid the same promptly at the end of each month, to the 8th day of June, 1867; that when he settled with appellants they paid him for three months' interest; that he credited all the other payments of interest upon the agreement, or contract, on the day of settlement, entering them as of the day upon which they were due; that the settlement referred to was made on the 7th day of October, 1867; that

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he and appellant Sparks had some dispute about the payment of the last month's interest, the same being due on the 8th day of October, 1867; that he insisted that appellants pay the same upon the day of settlement, which they failed to do; that all the interest he received between said dates, was the eight payments endorsed upon the agreement. This was all the evidence given in the case. The court found for appellee, and assessed his damages at \$1,802.34.

Amount of note.....\$1,779.00
Interest from September 8th, 1867, to January

31st, 1868, date of judgment..... 41.50

Total..... 1,820.50

Recouping two per ct. from March 9th to September 8th, 1867..... 18.16

Leaving balance of..... 1,802.34

For which amount the court rendered judgment, thereby allowing appellee to retain interest at the rate of ten per cent. from the 9th day of March, 1867, to the 8th day of September, 1867.

The appellants moved for a new trial, assigning various reasons therefor; the only available ones are as follows:—

That there was error in admitting in evidence, over appellants' objection, the written agreement set out in fourth paragraph of appellee's reply.

That the court erred in the assessment of the amount of the recovery, in this, that the same was too large.

That the finding of the court was contrary to law.

That the finding of the court was not sustained by sufficient evidence. Which motion the court overruled, to which appellants at the time excepted. The court rendered judgment upon the finding, and decreed that the mortgage be foreclosed.

The first error assigned is upon the ruling of the court below, in overruling appellants' demurrer to the fourth paragraph of appellee's reply. The fourth paragraph admits

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the receipt of the usurious interest, as averred in the fifth paragraph of appellants' answer, but alleges that the same was received in pursuance of a written contract to pay the same, which contract was made a part of, and set out in said reply.

This reply it is insisted is a departure from the cause of action stated in the complaint. The objection is trivial. The suit is upon the note. The answer alleges the payment of a certain amount of illegal interest upon the note, and seeks to reduce the recovery that much. The reply avers that such payment was made under a written contract to pay that rate of interest. If the reply be good, it simply sweeps away the answer in recoupment and leaves the cause of action standing as stated in the complaint.

Is the reply good? The act of March 9th, 1867, permits interest at the rate of ten per cent. per annum to be collected, provided the contract be in writing, signed by the party to be charged. The contract set out in the reply was voidable until this act was passed, when it became effective, at least so far as any payments were made under it. It did not, as appellants insist, impair the obligation of a contract, but it at least enabled parties to a contract previously voidable to avail themselves of its provisions, and validated their acts done in accordance therewith. This is all we are required in this case to rule.

The judgment is affirmed, with six per cent. damages, and costs.

A. Ennis, for appellants.

C. F. McNutt, W. A. Montgomery, and G. W. Grubbs, for appellee.

The Evansville and Crawfordsville Railroad Company *v.* Miller.

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY *v.* MILLER.

RAILROADS.—Assessment of Damages.—Constitutional Law.—Trial by Jury.—

Upon an appeal to the Circuit Court from a proceeding before a justice of the peace to assess damages sustained by the owner of land taken for public use under the ninth section of the act to incorporate the Evansville and Illinois Railroad Company (Local Laws 1849), the Circuit Court, sitting as a court of chancery, may take the opinion of a jury upon a single question of fact, but in such cases trial by jury is not a constitutional right.

SAME.—Practice.—Burden of the Issue.—The only question presented in the Circuit Court on an appeal by the owner of the land condemned being the measure of damages; *held*, that the appellant had the right to begin.

SAME.—Judgment.—In such case it is error to render a common judgment against the corporation for the damages, without a decree for the conveyance of the land in question to the corporation upon the payment of the money.

APPEAL from the Vanderburgh Circuit Court.

FRAZER, J.—This was a proceeding to condemn lands to public use, under the ninth section of the act to incorporate the Evansville and Illinois Railroad Company (Local Laws 1849). The appellee took the case to the Circuit Court for review, as provided by that section. The petition to the Circuit Court complained only that inadequate damages had been assessed before the justice of the peace.

A jury trial, to which the appellant objected, and in which the appellee was permitted to begin, resulted in an increased assessment of damages, and there was then entered an ordinary judgment against the appellant for the damages assessed.

A jury trial was not a matter of right. According to the act already cited, the Circuit Court proceeds, “acting and sitting as a court of chancery.” In such cases it is very clear that trial by jury is not a constitutional right. But a court of chancery might take the opinion of a jury upon a single question of fact; and we think, therefore, that

Hart v. Clouser.

there was no available error in the proceedings in that particular.

Inasmuch as no question but the measure of damages was presented in the Circuit Court, there was no error, we think, in giving the appellee the right to begin. He had the affirmative of the question.

The court rendered a common judgment against the appellant for the damages, without any decree for a conveyance to the appellant upon the payment of the money. This was in violation of the express letter of the act already referred to, and must reverse the judgment.

The judgment is reversed, with costs, and the cause remanded, with directions to render a decree according to this opinion.

A. Iglehart, for appellant.

J. M. Shackleford, for appellee.

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PROMISSORY NOTE.—Surety.—The material alteration of a promissory note after its execution, without the knowledge or consent of the surety, by adding a clause fixing the rate of interest, constitutes a good defense to a suit on the note so altered against the surety.

APPEAL from the Blackford Circuit Court.

FRAZER, J.—Suit by the appellant against one Ervin and the appellee, upon a promissory note for one hundred and fifty dollars, with interest at eight per cent. per annum. The appellee answered under oath, that he was only surety; that after the execution of the note, and without his knowledge or consent, the same had been materially altered by adding the clause fixing the rate of interest.

The case is here on the evidence, which fully sustained

The State *v.* Thrift.

the answer. We perceive no reason for interference with the finding. The defense was complete without proof that an agreement was made between the creditor and principal debtor to extend the time of payment. The note sued on was not the note of the appellee.

The judgment is affirmed, with costs.

J. Brownlee, for appellant.

A. B. Jetmore, W. A. Bonham, and J. T. Wells, for appellee.

THE STATE *v.* THRIFT.

CRIMINAL LAW.—*Indictment.—Perjury.*—In an indictment for perjury, the offense was charged to have been committed by the defendant in testifying in a cause where "it was a material question whether the said A. had entered a credit of forty dollars on the promissory note then in controversy;" and the false testimony charged was, that "the credit on said note was twenty dollars, when, in truth and in fact, it was forty dollars." *Held*, that the offense was not charged with sufficient certainty.

SAME.—*Time.*—The indictment stated the time when the perjury was committed, thus: "at the April term of the Hendricks Circuit Court, in the year 1867."

Held, that this was sufficient, under section 56 of the criminal code.

APPEAL from the Hendricks Circuit Court.

FRAZER, J.—The indictment, which was for perjury, was quashed below, and that is the error assigned.

Two objections to it are urged. 1. That the time when the offense was committed is not stated with sufficient certainty. It is stated thus: "at the April term of the Hendricks Circuit Court, in the year 1867." This is certainly sufficient, under the criminal code (2 G. & H. 402, sec. 56), by which it is enacted that the precise time need not

The State v. Thrift.

be stated, but it is sufficient if it appear to be within the statute of limitations. The terms of the Circuit Court are fixed by statute, and that court and this can judicially know when the April term of the Hendricks Circuit Court for 1867 took place, and that the period of limitation had not expired when this indictment was found. 2. The perjury of the defendant was charged to have been committed in testifying as a witness in a cause tried in court between Susan E. Parsons, plaintiff, and David A. Thrift, defendant, where it was material to know whether "the said David A. Thrift had entered a credit of forty dollars" on a certain promissory note. The false testimony charged was, that "the credit on said note was twenty dollars, when, in truth and fact, it was forty dollars." It is objected that this does not charge the offense with sufficient certainty. The issues in the cause, upon the trial of which the alleged false testimony was given, are not stated, so that we could know for ourselves whether the fact sworn to was material or not. We must, therefore, rely for our information on that subject upon the averment of the pleader, that "it was a material question whether the said David A. Thrift had entered a credit of forty dollars on the promissory note then in controversy." What is to be understood from this? That the question was as to the person who had entered the credit, or the amount of the credit? We know that it is possible that, in a suit where a promissory note is in controversy, either of these questions, or even both of them, might be material. But here we learn that only one question was material. What was that one question? If it was whether Thrift had entered the credit on the note, then the evidence upon which the perjury is assigned was not material to the question. In a word, the indictment leaves it in entire uncertainty whether the evidence given by Thrift was material. It may be inferred that the material question was as to the amount of the credit; if we are to assume that the pleader knew that the evidence would be material to that question, and not to the other. But we are not aware of any rule of

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law by which an otherwise defective pleading is to be helped by the presumption that the pleader knows the law.

The judgment is affirmed.

D. E. Williamson, Attorney General, for the State.

L. M. Campbell, for appellee.

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f169 213

THE NEW EEL RIVER DRAINING ASSOCIATION *v.* CARRIGER.

DRAINING ASSOCIATION.—Assessment.—A draining association under the laws of this State can have no corporate existence or power to make a valid assessment upon the lands affected by the drain, until its articles of association have been recorded.

APPEAL from the Boone Circuit Court.

FRAZER, J.—The appellant is a draining association incorporated under the laws of this State. It sued to enforce against lands benefited by its work, an assessment which had been made before its articles of association were recorded. This appearing by the complaint, a demurrer thereto was sustained by the court below.

There is no error. Until the articles of association were recorded there could be, under the statute (1 G. & H. 303, sec. 5), no corporate existence, and, of course, no power to make a valid assessment upon the lands affected by the drain.

The judgment is affirmed, with costs.

A. J. Boone, R. W. Harrison, O. S. Hamilton and C. C. Galvin, for appellant.

J. M. Butler and C. C. Nave, for appellee.

Curry and Others v. Keyser.

30	214
139	224
30	214
140	183
142	553
30	214
164	568

CURRY and Others v. KEYSER.

SALE.—*Misrepresentations.*—Where a misrepresentation as to the nature and quantity of property sold amounted only to an opinion of the seller, who had no notice or reason to suspect that the buyer was relying upon his estimate, and no special qualification in the particular matter for making a more accurate estimate than the buyer, and it did not appear that the buyer, who relied upon such representation, had been injured; *held*, that there was no fraud.

PLEADING.—*Fraud.*—It is not enough that a pleader characterize a transaction as fraudulent by the simple use of that word; he must allege such facts as show that conclusion.

APPEAL from the Knox Circuit Court.

FRAZER, J.—This was a suit upon a promissory note calling for three thousand five hundred dollars. Error is assigned upon the action of the court below in sustaining demurrers to the first and third paragraphs of the answer.

The first paragraph of the answer avers, that the consideration of the note in suit was a certain steam saw-mill, and personal property, and certain timber trees growing upon certain lands, purchased at seven thousand dollars; that the plaintiff fraudulently represented to the defendants that the trees would make a certain quantity of lumber, whereas, in truth, they would make much less, and were of less value by four thousand dollars than if they would have made the quantity of lumber represented; that the defendants were unacquainted with said timber, its quantity, &c., and relied wholly upon the representations of the plaintiff, who was an expert in sawing timber. This paragraph is, in our opinion, wholly insufficient. It shows nothing but an opinion expressed by the plaintiff as to the nature and quantity of the property sold. The representations, it is alleged, were fraudulently made, but the facts alleged do not show any such thing. It was not enough that the pleader should characterize the transaction as fraudulent by the simple use of that word. It is the office of a pleading to allege facts, not legal conclusions. Nor

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does the averment that the defendants relied upon these representations help the answer. That may have been their own folly. A case of known trust and confidence reposed is not shown. The plaintiff had no notice, nor reason to suspect, that the defendants were relying upon his estimate; and it is, indeed, not inconsistent with the averments, that the plaintiff was as little capable of estimating the amount of lumber in a growing forest as the defendants. It is not perceived that his alleged skill in sawing lumber would qualify him to make such an estimate with much accuracy, or constitute any just basis for confidence in his opinion upon the subject. Moreover, the defendants do not seem, from the averments, to have made a disadvantageous bargain.

The third paragraph of the answer, which is also, in form, a counter-claim, is much like the first, and no better in law. Indeed, some of its averments, as, for example, that the timber is worth fifty thousand dollars less than if it had been as represented, when the purchase price of the whole, including a steam saw-mill and a large amount of other property, was only seven thousand dollars, look much like sham pleading.

The judgment is affirmed, with costs.

W. E. Niblack and W. H. De Wolf, for appellants.

J. C. Denny and G. G. Reily, for appellee.

Newcomer v. Wallace and Others.

NEWCOMER v. WALLACE AND OTHERS.

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148 289

DECEDENTS' ESTATES.—*Payment of Debts.*—The act concerning the settlement of decedents' estates (2 G. & H. 483) makes the personal estate the primary fund for the discharge of all liabilities, whether for debts contracted by the intestate which might in his lifetime be made by execution against his general property, or liabilities which are primarily incumbent on his real estate only (having been contracted by his grantor), with a personal liability over to indemnify his grantor if the debt should fall upon the latter.

SAME.—*Mortgage.*—A decedent's real estate was incumbered by a mortgage made by his grantor, who conveyed subject to the mortgage.

Held, that the personal estate was the primary fund for the discharge of the incumbrance.

SAME.—*Sale of Real Estate to Pay Debts.*—Real estate cannot be sold by an administrator unless the personal estate is insufficient to pay the liabilities, and, ordinarily, only so much as is necessary for that purpose.

SAME.—*Order of Payment.*—Judgments which are liens upon a decedent's real estate and mortgages thereon may in every case be paid at once, and must be paid before general debts, which may not be paid until a year has expired from the first granting of letters of administration.

APPEAL from the Marion Common Pleas.

FRAZER, J.—Christian Newcomer died, intestate, seized of real estate subject to a mortgage which was upon the property when he purchased it. The deed of conveyance to him passes the title "subject to the mortgage * * which said Christian Newcomer is to fully pay and satisfy." He died in 1863, leaving the appellant, his second wife, without children of theirs surviving him. She became administratrix, and paid off the mortgage (\$2,390) out of the personal assets. Afterwards this real estate was sold to pay debts, and after all were paid there remained a surplus for distribution of \$2,198.32. The personal assets amounted to \$8,423.70, and the debts of the estate, not including the mortgage, to \$1,000. In this suit the widow claims that the amount paid to discharge the mortgage shall be charged to the real estate, thus leaving the fund on hand to be distributed mainly as personal estate, of which she would receive one-third.

Newcomer v. Wallace and Others.

The question seems to be regulated in this State by express statute, and in a manner fatal to the widow's claim in this case. The proposition urged in her behalf by counsel is, that as the indebtedness secured by the mortgage was not the personal indebtedness of the intestate, therefore the land was the primary fund for its payment. Numerous authorities are cited for and against this proposition, in the absence of a statutory rule upon the subject, and the question is an interesting one; but, as already stated, we think our statute settles the matter, and for that reason we forbear considering what might otherwise be the rights of the parties.

We are of opinion that the act concerning the settlement of decedents' estates (2 G. & H. 483), in its general scope and spirit, as well as by its specific provisions, makes the personal estate the primary fund for the discharge of all liabilities, whether for debts contracted by the intestate which might in his lifetime be made by execution against his general property, or liabilities which are primarily incumbent upon his real estate only (having been contracted by his grantor), with a personal liability over to indemnify the grantor if the debt should fall upon him, a liability which it is not questioned was in this case created by accepting the deed containing the clause which we have quoted.

By the statute (sec. 75), real estate cannot be sold by an administrator unless the personal estate is insufficient to pay the liabilities, and then, ordinarily, only so much as is necessary for that purpose (sec. 81). Judgments which are liens upon real estate and mortgages thereon must be paid before general debts (sec. 109); and these may in every case be paid at once (sec. 108), though general debts may not be paid until a year has expired from the first issuing of letters of administration. It is, however, denied that this statute requiring the administrator to pay mortgages before general debts applies to mortgages made by the grantor of the decedent, and not as security for a debt of the latter,

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and insisted, that the personal estate, though the primary fund for the payment of debts contracted by the decedent, cannot be applied by the administrator in a case like this. It may be remarked that the language of the statute (sec. 109) is general—"all claims against the estate of the decedent," not merely those against the personal estate.

GREGORY, J., dissented.

The judgment is affirmed, with costs.

L. Barbour and C. P. Jacobs, for appellants.

J. S. Tarkington and N. B. Taylor, for appellees.

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125	964
30	919
198	515

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MARTIN AND WIFE v. REED.

DECEDENTS' ESTATES—*Distribution Without Personal Representative*.—The heirs to whom, under the laws of descent and distribution of the domicil of an intestate, his personal estate descends, subject only to the payment of his debts, are entitled to its possession, subject to the rights of the personal representative; but where there are no debts, if the heirs can agree upon a distribution, there is no absolute necessity for the appointment of a personal representative. The heir entitled by such distribution to a note secured by a trust deed, belonging to the assets, or his assignee, may enforce payment of the claim in equity.

SAME.—*Trustee.—Assignment by*.—A deed in the nature of a mortgage on real estate to secure the payment of a note was made to a person, as trustee, who afterwards became a beneficiary of the trust by descent, as one of the two heirs at law of the legatee of the *cestui que trust*, and assigned the note and trust deed to his co-heir, without administration on the estate of the legatee.

Held, that a suit to foreclose the trust deed might be maintained in equity by one claiming through such assignment.

APPEAL from the Warren Common Pleas.

ELLIOTT, J..—This was a suit by Reed, as assignee, against Martin and wife, to foreclose a mortgage, or deed of trust, executed by the latter to Nelson Kellenbarger on certain

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lands in Warren county, in this State. A demurrer to the complaint, for the want of sufficient facts to constitute a cause of action, was filed and overruled.

A trial was had upon issues of fact, which resulted in a finding and judgment for the plaintiff. The defendants below appeal.

The ruling of the court on the demurrer to the complaint raises the only question for our decision. The facts, as they appear by the complaint, are these: On the 2d of November, 1857, the appellant, William R. Martin, executed to George Kellenbarger, sen., a promissory note for three thousand dollars, payable three years after date, with interest from date, at the rate of ten per cent. per annum, payable semi-annually. Martin, at the same time, executed to Nelson Kellenbarger, the son of said George, a deed of trust, in the nature of a mortgage, in which his wife joined, to secure the payment of said note and the interest thereon, on certain real estate in Warren county, Indiana. The note and mortgage were executed in the State of Ohio, and the law of that State allowing parties to contract for the payment of interest at the rate of ten per centum is set out in the complaint. George Kellenbarger, sen., died in the State of Ohio, in 1862, testate, leaving his widow, Jemima Kellenbarger, and his two sons, Nelson and George Kellenbarger, jr., his only children and heirs at law. By his last will, which was duly proved and admitted to probate, George Kellenbarger, sen., first charged his personal property with the payment of his debts, and gave all the remainder thereof absolutely to his said wife, if she survived him. Administrators, with the will annexed, were duly appointed, and on the final settlement of the estate there remained in their hands, for distribution, the sum of \$28,009.32, which the court ordered the administrators to distribute "as directed by the will of the decedent."

It is averred in the complaint that the administrators, pursuant to said order, delivered and paid over to Jemima Kellenbarger, the widow of the decedent, the whole of said

Martin and Wife v. Reed.

sum of \$28,009.32, included in which was the note for \$3,000 and the mortgage, or deed of trust, on which this suit is brought. That said Jemima Kellenbarger died, intestate, in the State of Ohio, on the 25th of December, 1865, in the possession of said note and deed of trust, leaving the said Nelson Kellenbarger and George Kellenbarger her only children and heirs at law; that no administration was ever granted on her estate, and that the said Nelson and George as her only heirs at law took possession of her personal property, amongst which was said note and mortgage, or deed of trust, and it thereby became invested in them absolutely by descent as her only heirs. On the 30th of August, 1867, Nelson Kellenbarger sold, and by indorsements thereon, assigned all his right and interest in said note and trust deed to said George Kellenbarger, jr.; and afterwards and before the commencement of this suit, George Kellenbarger assigned and transferred the same in writing to the plaintiff in trust for the benefit of the creditors of said George.

It is also averred that the note and the interest thereon remain unpaid, except the sum of \$572.71 paid to George Kellenbarger, sen., on the 10th of November, 1857, and credited thereon. Prayer for judgment on the note and for a foreclosure. The deed of trust and the note secured thereby and the several assignments thereof, are made a part of the complaint.

The only objection urged to the complaint which need be noticed is, that the note and trust deed by which it was secured belonged to Jemima Kellenbarger at her death, and could only be enforced by her legal representative, and that the fact that administration had never been granted on her estate did not authorize her sons, Nelson and George Kellenbarger, to sue thereon or to transfer the same to the plaintiff; that their assignment of the note and deed of trust was but an unlawful intermeddling with the estate of said Jemima, and did not confer any right, either legal or equitable, upon the plaintiff below.

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Jemima Kellenbarger at the time of her death was a resident of the State of Ohio, and her personal estate was subject to the laws of descent and distribution of that State. And if, as is alleged in the complaint, it vested upon her death absolutely by descent in Nelson and George Kellenbarger as her only heirs at law, their right to transfer it would be unquestionable. If it descended to them subject only to the payment of the debts of the intestate, they were entitled to its possession, subject only to the rights of the personal representative. If the intestate owed no one, which is highly probable from the facts shown by the complaint, then, if her heirs could agree amongst themselves upon a distribution of her property, there was no absolute necessity for the appointment of a personal representative. Under such circumstances, no good reason is perceived why the heir entitled to it might not enforce the payment of the claim in equity.

Besides, the deed of trust was made to Nelson Kellenbarger, and it is clear that as the trustee of an express trust he might have brought a suit for the foreclosure of the equity of redemption and sale of the lands for the payment of the debt, at any time after it became due. As one of the heirs of his mother, he became at her death one of the beneficiaries of the trust, and as the plaintiff claims through his assignment, we think the action may be maintained in equity.

We conclude, therefore, that the court below did not err in overruling the demurrer to the complaint.

The judgment is affirmed, with five per cent. damages and costs.

J. McCabe, for appellants.

R. F. Gregory, and *J. Harper*, for appellee.

Starkey v. Neese.

STARKEY v. NEESE.

PLEADING.—*Breach of Covenant.*—Where, in a suit upon a promissory note given for the purchase money of real estate, it is intended to rely in defense upon the breach of any covenant in the deed of conveyance, the original deed or a copy thereof should be filed with the answer, and such facts should be averred as constitute the breach relied on.

SAME.—*Failure of Title.*—In such suit, an answer setting up a failure of title, without showing a breach of covenant, in the absence of fraud, is bad.

CONTRACT.—*Consideration.*—A. purchased certain real estate from B., the legal title being in C., to whom there was a balance of purchase money due from B., for which A. gave his note to C. and took from him the deed. *Held*, that, as between A. and C., the consideration of the note was the indebtedness of B. to C.

APPEAL from the Boone Common Pleas.

GREGORY, J.—Suit by the appellee against the appellant on a promissory note. The defendant answered:—1. The general denial. 2. That the note was given in consideration of part of the purchase money of real estate described; that the plaintiff sold, and by deed in fee simple conveyed, to the defendant the premises with all the appurtenances and improvements thereto belonging; that at the time of the purchase and sale there was erected and standing thereon and belonging to the premises, a ware and store house of the value of two hundred dollars, which entered into and was a part of the consideration of the note; that the defendant at the time of the purchase and conveyance believed that the ware and store house belonged to and was conveyed with the premises; that the plaintiff made no reservation of the house in his contract or in his conveyance, but sold and conveyed the same to defendant and took the note for the purchase money therefor; that at the time of the sale and conveyance, as aforesaid, the ware and store house belonged to one Simpson B. Trout, who long before that time had owned the same by purchase from the plaintiff, with the right and privilege of removing the same; all of which was unknown to the defendant at the time of the

Starkey v Neese.

purchase and conveyance; that afterwards Trout took and removed the ware and store house off the premises, to the damage of the defendant two hundred dollars, wherefore the consideration of the note had entirely failed.

The plaintiff replied:—1. The general denial. 2. That the plaintiff was not the owner of the house at the time he sold and conveyed the premises to the defendant; that the defendant knew the fact; that at the time the plaintiff conveyed the premises to the defendant, he informed him that the house did not belong to him, but to Simpson B. Trout; that the defendant agreed with the plaintiff that Trout should have the house and remove the same from the premises; that afterwards, in pursuance of the agreement, Trout did, with the consent of the defendant, remove the house from the premises.

The defendant moved to reject the second paragraph of the reply; the court overruled the motion, and the defendant excepted.

The defendant then demurred to it, which was overruled. Trial by the court; finding for the plaintiff the amount of the note and interest. The defendant moved for a new trial, which motion the court overruled. There is a bill of exceptions in the record setting out the evidence.

The testimony tended to show, that one Elston made the sale of the premises to the defendant; that the legal title was in the plaintiff, and that there was at the time the amount of the note, of unpaid purchase money, due from Elston to the plaintiff; that some two weeks before the sale and conveyance, the defendant had a conversation with the plaintiff about the purchase of the property; the latter then told the former that the house did not belong to him, but at the time of the conveyance there was nothing said about it. The house, without the lots, had been the subject of repeated sales; Elston himself had owned the house not a great while before the sale to the defendant. The deed from the plaintiff to the defendant was put in evidence, and

Starkey v. Neese.

is a deed with full covenants. The house was worth from \$150 to \$200.

It is claimed that the court erred in overruling the appellant's motion to reject the second paragraph of the reply, and in overruling the demurrer thereto.

The reply is as good as the answer. The answer was bad. *Laughery v. McLean*, 14 Ind. 106, is very much in point. The answer in that case was an entire want of title. This court say:—"The deed is not set out, nor is it averred in the answer that it contained any covenants of seizin, right to convey, or any other covenants whatever. If the deed contained any covenants that were broken, the original or a copy thereof should have been filed as the foundation of the defense (code, § 78), and there should have been such facts averred as would show a breach of the covenants relied upon. It is not necessary for us here to determine whether the want of any title in the plaintiff would be a breach of the covenant of seizin and right to convey, as long as the defendant was in the undisturbed possession of the land, as no covenants are set out or relied upon. For aught that appears, the conveyance was a mere quitclaim, without any warranty whatever; and in such case, in the absence of fraud, a want or failure of title cannot be set up in bar of the action for the purchase money." This case was followed by this court in *Coleman v. Hart*, 25 Ind. 256. It is true, in the case under consideration, the deed produced in evidence was a deed with full covenants, but there was no issue involving the breach of any of them.

The evidence showed no failure of consideration. The defendant himself testified as follows: "I paid Elston \$300, cash down, at the time of the sale, and at the time of executing the deed by plaintiff, I gave him the note for \$175, sued on, which makes \$475, the amount of purchase money. Elston owing that amount on his purchase to Neese, it was agreed that I should make the note to him instead of making it to Elston."

As between the plaintiff and the defendant, the consider-

The State v. Boone.

ation of the note was the indebtedness of Elston to the plaintiff.

The court below committed no error in overruling the motion to reject and the demurrer to the second paragraph of the reply, or in overruling the motion for a new trial.

The judgment is affirmed, with costs.

O. S. Hamilton, C. C. Galvin, S. E. Perkins, L. Jordan and S. E. Perkins, Jr., for appellant.

30	225
130	439
130	447
30	225
134	254
30	225
147	631

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CONSTITUTIONAL LAW.—Fish Law.—The act of March 9th, 1867 (Acts 1867, p. 128), "to provide for the protection of fish," &c., is constitutional.

APPEAL from the Clay Circuit Court.

GREGORY, J.—The appellee was indicted under the act of March 9, 1867 (Acts 1867, p. 128), for seining and catching fish contrary to its provisions.

It was claimed that the law is unconstitutional, and the court below, on the motion of the defendant, quashed the indictment. This was wrong. This question was met and settled by this court in *Gentile v. The State*, 29 Ind. 409.

The judgment is reversed, and the cause remanded, with directions to overrule the motion to quash, and for further proceedings.

D. E. Williamson, Attorney General, for the State.

Jeffries and Others v. MacCown.

JEFFRIES and Others v. MACCOWN.

GRAVEL ROAD.—Way.—*Trespass.*—A proceeding in regular form before a justice of the peace to obtain the right of way for a gravel road company resulted in a judgment on the report of the jury, that no damages would be sustained by the owner of the land. From this judgment the owner appealed to the circuit court, where, on his motion, the cause was dismissed over the objection of the company, and the company appealed from the judgment of dismissal to the Supreme Court. Pending this appeal, the owner sued the company for trespass.

Held, that the proceeding before the justice gave the right of entry, which the order of dismissal could not divest.

SAME.—Estoppel by Record.—It may be that but for the appeal to the Supreme Court the company would have been estopped by the judgment of dismissal from showing that the proceeding before the justice was regular.

APPEAL from the Hendricks Common Pleas.

GREGORY, J.—The appellants sued the appellee in the court below for trespass to land.

The defendant answered: 1. The general denial. 2. That the defendant did enter upon the land of the plaintiffs and did the acts complained of, but that the plaintiffs were in nowise damaged or injured thereby, and ought not to maintain their action against the defendant therefor, because the latter did so enter upon the lands and do the acts complained of as the agent of, and under the authority from, The Danville and North Salem Gravel Road Company, a corporation duly organized under the laws of Indiana for the construction of gravel roads; that the company had, before the commission of any of the grievances complained of, located the road across the lands of the plaintiffs, as described in the complaint, and demanded of the plaintiffs the right of way over the same, and had offered to pay any damages they might sustain, and had thereafter, upon the refusal of the plaintiffs, given notice to Enion Singer, a justice of the peace of the township wherein the plaintiffs resided, and instituted proceedings before him to obtain the right of way over the lands, and to assess the damages

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of the plaintiffs, if any, by reason of the construction of the gravel road upon the lands; that in the proceedings parties were summoned to assess the damages of the plaintiffs, who reported that no damages would be sustained by them, whereupon the defendant, under the authority and appointment of the company, proceeded in the construction of the work, and in so doing, did the acts complained of, necessarily, and without damages to the plaintiffs equal to the benefits derived from the road; that the plaintiffs, on, &c., appealed the case from the justice to the Hendricks Circuit Court, and on their motion, and over the objection of the company, the cause was dismissed, and from the dismissal the company appealed to the Supreme Court, which appeal was still pending, and not disposed of. A certified copy of the record was filed, showing, among other things, that the proceeding before the justice of the peace was regular, fully complying with the requirements of the statute.

A demurrer was overruled to this paragraph of the answer. The appellants stood by their demurrer, and final judgment was rendered for the appellee. This presents the only question in the case.

It is contended by the appellants that the order of the Circuit Court dismissing the cause put an end to the proceeding to condemn the right of way, and left the defendant a trespasser *ab initio*; and that the appeal to the Supreme Court left the judgment of dismissal in full force, with all its consequences.

It is claimed by the appellee, on the contrary, that an offer to pay the damages, if any, and the proceeding before the justice, authorized the company to proceed with the work, and that the appeal did not suspend that right.

The statute provides that, "in case of appeal from the judgment of any justice of the peace, upon any report of any jury for the appraised amount of damages, touching the right of way, or for lands taken for the purpose of constructing thereon the road of such company, as provided in this act, such appeal shall not prevent such company

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from proceeding in the construction of its road over such lands, nor deprive it of its right of entry thereon for that purpose, which right is hereby expressly granted." 1 G. & H. 476, sec. 9.

The company is not in fault; the case was dismissed over its objection; an appeal was without delay prosecuted. It is true that an appeal to the Supreme Court only suspends action on the judgment; but in the case at bar, the proceeding before the justice gave the right of entry; the order of dismissal could not divest that right. It may be that the company would have been estopped by the judgment from showing that the proceeding before the justice was regular, but for the appeal to the Supreme Court.

Any other construction of this statute would work great harm. A gravel road company would never be safe in proceeding with its work until after the final determination of the litigation to condemn the right of way. A single case involving the right to enter on a very small lot might suspend a public improvement for years. The court below committed no error in overruling the demurrer.

The judgment is affirmed, with costs.

C. C. Nave, for appellants.

L. M. Campbell, for appellee.

MINOT and Another v. MITCHELL.

TRUSTS.—*Sheriff's Sale.*—A person cannot be treated as a trustee, who, without fraud, purchases real estate at a sheriff's sale with his own money, and takes the title in his own name, upon a verbal agreement to hold it for the benefit of the execution debtor.

PRACTICE.—*Appeal.—Unavilable Error.*—An erroneous instruction to the jury cannot, on appeal, be made available as error by a party on whose motion it was given.

APPEAL from the Noble Circuit Court.

The appellants, Jane and Mary M. Minot, sued John

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Mitchell, the appellee, and Charles S. Mitchell, alleging, in substance, in their amended complaint, that in the spring of 1855, Samuel Minot, the husband of said Jane and father of said Mary M., became embarrassed in business and unable to pay his debts, many of which had then passed into judgments; that he applied to his friend, William Mitchell, since deceased, father of the defendants, who entered himself replevin bail for the stay of execution on all the judgments on which the period of stay had not expired, amounting to about six thousand dollars; that said Samuel was then the owner of certain real estate described, of the value of twenty-five thousand dollars, upon which the sheriff had levied an execution amounting to three thousand two hundred and twenty-six dollars and thirteen cents; and said real estate was then advertised for sale; that said William agreed that he would bid in said property for said Samuel, at the sheriff's sale, in his own name, pay the purchase money, and hold said land in trust as security for the money advanced by him in the purchase thereof, and also to secure him as replevin bail upon said judgments; that it was agreed that said Samuel should retain possession of said land, and make sales thereof as fast as the same could be done, the said William to make conveyances and receive the purchase money, and apply the same in payment of the money so advanced by him, and the judgments so replevined by him, the residue to be reconveyed to said Samuel; that said William did, accordingly, on the 13th of May, 1855, bid in said property for said sum of three thousand two hundred and twenty-six dollars and thirteen cents; that by reason of said agreement said Samuel failed to attend said sale, or to make further exertions to pay said executions, and by reason thereof other persons were prevented from bidding upon said lands; that soon afterwards said Samuel sold and assigned to said William a large stock of goods, together with his best notes and accounts, all to the amount of about fifteen thousand dollars, to be disposed of in like manner, the residue to be paid

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to said Samuel; that one Iddings, who held one thousand four hundred dollars belonging to said Samuel, paid it, by his direction, to said William, upon a like trust; that said Samuel was soon afterwards stricken with paralysis and rendered incapable of transacting any business; that while in this condition he was frequently visited by said William, who pretended great friendship for him, promising to carry him safe through his pecuniary difficulties; that said William, so holding said property in trust, knowing that he could not hold said land by any title derived from said sheriff's sale, for the reason aforesaid, and that in case of said Samuel's death, said Jane would be entitled to one-third of said land, in order to cheat and defraud the plaintiffs, about the 6th of March, 1856, without consulting said Samuel or his wife, procured a general warranty deed to be written, conveying said land to him for the nominal consideration of one thousand dollars, and demanded of said Jane that the same should be executed by her and the said Samuel, urging as a reason therefor, that said Samuel was incapable of attending to business, was liable to die at any moment, and in case of his death, he, said William, would be greatly embarrassed on account of having become his surety; that the estate would go into the hands of an administrator, and be squandered; that he knew more about Samuel's business than any one else, but that purchasers were afraid of sheriff's titles; that if they would execute the deed he could sell the property at a fair value, and would sell enough to pay the debts and save something for the family; that said Jane, believing these representations, and ignorant of her rights, executed said deed, and procured her husband to execute it, but that nothing was paid by said William in consideration therefor, and that said Samuel retained possession and enjoyed the profits of said property as before, and exercised acts of ownership over it, with said William's knowledge and consent; that the representations of said William were false and fraudulent in this: that at the time of the execution of said deed the said William had in his

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hands of the avails of said property of said Samuel enough and more than enough to pay him for all the money advanced by him for said Samuel, and to pay all of said Samuel's debts, for which the said William had become surety, and there was no necessity for the sale of any of said lands for the payment of said debts; that on the 31st of August, 1857, the said Samuel died, intestate, leaving the said Jane, his widow, and the said Mary M., his only heir at law; that on the 7th of April, 1857, the said William procured the sheriff's deed for said land; that all the money advanced by said William, and all the debts for which he had become surety, were paid out of the proceeds of the property before the making of said sheriff's deed; that said William, in his lifetime, received from said stock of goods and notes fifteen thousand dollars, from said Iddings fourteen hundred dollars, and from sales of said lands twenty-three thousand dollars, being in all twenty-eight thousand four hundred dollars more than the amount advanced by said William, the judgments stayed, and all debts paid by him; that said William has since died, intestate, leaving the said John and Charles S. Mitchell his only heirs at law, to whom all the unsold portions of said trust estate, and other real and personal estate of the value of five hundred thousand dollars descended; that since the death of said William defendants have sold portions of said trust estate, but what portions, to whom sold, and for what price, plaintiffs are not informed; that plaintiffs have demanded of the defendants a settlement of said trust estate, payment of the amount due the plaintiffs, and a reconveyance and the possession of all said trust lands not conveyed by defendants or their ancestor, which they refuse; that since the commencement of this suit, said Charles S. Mitchell has died, intestate, leaving said John his sole heir at law. Prayer for an account, for judgment for the sum found due, for possession of the undisposed portion of said lands, and other proper relief. A bill of particulars of "moneys received by William Mitchell, as trustee

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for Samuel Minot, from the avails of the trust estate," is filed with the complaint.

The defendants answered in several paragraphs: by the general denial; by denying the fraud charged, and alleging that the trust set up was not created in writing; and by alleging that Mitchell, in his lifetime, fully executed the trust, and settled the same with Minot.

Various other paragraphs setting up the statute of limitations were filed, to which demurrers were overruled, and the plaintiffs excepted and filed replies—a general denial by both, and infancy by Mary M.

On the trial before a jury, the plaintiffs offered to introduce Jane Minot, one of the plaintiffs, as a witness, to prove the allegations of the complaint, but the court held that she was incompetent to prove any matter which occurred prior to the death of William Mitchell, and refused to let her testify as to any such matters. The plaintiffs then offered to prove by said Jane that the first information or suspicion she had of any fraud or improper conduct on the part of William Mitchell, in relation to the matters charged in the complaint, was after the death of said William; but the court refused to permit her to testify as to such matters. To these rulings the plaintiffs excepted.

The court, at the defendant's request, instructed the jury, in substance, as follows: After setting out the allegations of the complaint and indicating that they must be proved as alleged, the court charged that "if Mitchell merely intended the money advanced as a loan and took the sheriff's deed simply as a security for this and his liability as replevin bail, then the sheriff's deed would operate simply as a mortgage, and Minot or his heirs might redeem; but if the sheriff's deed was, as alleged in the complaint, a mortgage, the deed of Minot and wife, of the 6th of March, 1856, would convey to Mitchell the equity of redemption of Minot and Mrs. Minot's contingent interest, and thus make Mitchell's title perfect, unless that deed was void, not for want of consideration, but void for the precise misrepresen-

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tations alleged in the complaint and the incapacity of Minot there stated; that if Mitchell bought the land at sheriff's sale in pursuance of a verbal understanding that he would dispose of it and with the proceeds pay all Minot's debts, you should find for the defendant; for in such case the land could not be held as alleged in the complaint. If Mitchell bought the land, not for the purpose of selling it and paying all Minot's debts, but simply to secure himself, then you will inquire whether the deed of March 6th, 1856, was obtained by Mitchell's fraud, as charged. If it contains covenants of warranty, and purports to have been made in consideration of \$1,000 paid by Mitchell to the grantors, it can only be attacked for the fraud alleged in the complaint. The plaintiffs are estopped to allege anything against that deed unless fraudulent. Mitchell had a right to buy Minot's equity and Mrs. Minot's interest, and, if this deed was not void for fraud, it conveyed all the interest of Minot and wife in the land. The burden of establishing fraud in this deed is on the plaintiffs. If the deed purports to have been made in consideration of \$1,000, the recital is *prima facie* evidence of its payment, and unless disproved by the plaintiffs must control you on that point. For the purpose of raising a trust on this deed the plaintiffs would not be permitted to disprove such payment. The fourth paragraph of the answer denies the fraud charged and denies that the trust was created in writing. This paragraph is pleaded to the whole action, and as there is no proof that the trust was created in writing, your verdict must be for the defendant, unless the fraud charged has been proved to your satisfaction. Fraud is never presumed, but must be proved by the party who asserts it."

The plaintiffs excepted to the giving of this instruction.

There was a general verdict for the defendant with special findings in answer to interrogatories. The court overruled motions by the plaintiffs for a new trial and for a *verdict de novo* and rendered judgment on the verdict, to all

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which the plaintiffs excepted. The evidence is not in the record.

RAY, C. J.—On the trial, the court, on the motion of the appellants, the plaintiffs below, by an instruction, limited the recovery in this action, in any event, to the lands still undisposed of and the proceeds of the lands sold by Mitchell or his heirs since the death of Minot. If, therefore, any error was committed by the court which alone affected the question of a recovery for the personal property, such error would not be available here.

So far as the real estate is involved, the complaint does not make Mitchell a trustee. His purchase at sheriff's sale was with his own money, and no fraud is charged in such purchase. It is not alleged that he prevented others from bidding on the property by representing that he was purchasing for the benefit of Minot.

It is a simple averment of a verbal agreement that Mitchell should purchase the property at sheriff's sale and take the title in his own name, he agreeing to hold it for the benefit of Minot. According to the complaint he did so purchase. The legal title vested in him without fraud. Can he be treated as a trustee? The rule is thus stated: "But in no case will the grantee be deemed a trustee, if he used no fraud or deceit in getting his title, although he verbally promised to hold the land for the grantor." Browne Statute Frauds, 92, § 95.

This practically ends the case. The rulings of the court upon the paragraphs of the answer pleading the statute of limitations are of no importance. The paragraphs were sustained, but no such issue was submitted to the jury by the charge of the court, as the transaction was treated as a mortgage, which certainly is a most favorable view for the appellants. The jury found that there was no fraud in the purchase at sheriff's sale, and that the subsequent deed was made without fraud and for the purpose of making Mitchell's title absolute.

Upon the exclusion of the evidence of Jane Minot, the

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widow of the ancestor of the heirs who sue, it is sufficient to say that she was not offered to prove fraud in the purchase at sheriff's sale, nor would such evidence have been proper, or relevant to the averments of the complaint.

The judgment is affirmed, with costs.

W. H. Coombs, and *W. H. H. Miller*, for appellants.

J. L. Worden and *J. Morris* for appellee.

CITY OF INDIANAPOLIS *v.* HUFFER.

CITY.—Street Improvements—Consequential Injuries to Private Property.—

An incorporated city is not ordinarily liable for consequential injuries to private property resulting from the grading and improvement of its streets, if, in making such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which is incumbent relates as well to the plan as to the execution of the work—in the case of a sewer, to its capacity, as well as to the mechanism in its construction.

30	236
136	187
30	235
141	554
30	235
145	318

SAME.—Damages.—Measure of.—In an action against a city to recover damages resulting from the overflow by water several times of the plaintiff's lot and dwelling thereon, used by him as a residence for his family, such overflows being caused by an insufficient and carelessly constructed sewer built by the city, the jury made up the amount of damages by ascertaining the losses suffered by the plaintiff by reason of injury to his realty, garden crops, and personal property such as household goods and family supplies, and adding thereto a certain sum on account of the decrease in the rental value of the premises during the period, caused by the backwater.

Held, that the damages were excessive.

EVIDENCE.—Opinion of Witness not an Expert.—Any witness, not an expert, who knows the facts personally, may give an opinion in a matter requiring skill, stating also the facts on which he bases his opinion.

APPEAL from the Marion Common Pleas.

FRAZER, J.—This was a suit against the city of Indianapolis to recover damages resulting from an overflow of the plaintiff's lot and dwelling thereon by water, caused by an insufficient and carelessly constructed sewer erected by the

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city. The answer, though in six paragraphs, amounted only to the general denial. The plaintiff had a verdict and judgment for \$980.05. A number of questions are presented.

The case shown by the evidence was, that in consequence of street improvements made by the city, the natural surface drainage of a considerable district was so obstructed that a sewer was rendered necessary to pass the water; that the city constructed a sewer of capacity wholly insufficient for the purpose, and that this insufficiency was perfectly obvious to any person of common sense at the time of its construction. As a consequence, the plaintiff's premises were several times submerged by ordinary freshets, and his property and household goods greatly injured. He used the place as a residence for his family, except when occasionally driven out by the water. The sewer was constructed when the lot was unimproved, after which he purchased it, and erected a dwelling upon it. It appears by answers to interrogatories that the jury made up the amount of damages by ascertaining the losses suffered by the plaintiff by reason of injury to his realty, garden crops, and personal property such as household goods and family supplies, and adding thereto the sum of \$384 on account of the decrease in the rental value of the premises during the period, caused by the backwater.

It seems very clear that this mode of ascertaining the damages could only result in an assessment which would be excessive. It compensates the plaintiff for all the injuries suffered by him, and then adds to that sum what he would have lost, if, instead of dwelling upon the property himself, he had let it to a tenant. But if the landlord should agree to make good to the tenant all damages caused by the overflow, would the rental value then be so greatly lessened by the liability to overflows? Did not the liability of the tenant's household goods to be thus damaged contribute to depreciate the rental value of the property? These questions are easily answered. Obviously, the damages assessed

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were excessive, and a new trial should have been granted.

An incorporated city is not ordinarily liable for consequential injuries to private property, resulting from the grading and improvement of its streets, if, in the making of such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which is incumbent relates as well to the capacity of the sewer as to the mere mechanism in its construction—as well to its plan as to its execution. *Logansport v. Wright*, 25 Ind. 512, and authorities there cited. *The Rochester White Lead Co. v. Rochester*, 3 Comst. 463, is especially in point. Indeed, the liability of a city in such cases rests on exactly the same foundation as that of a natural person. An infallible judgment is not required to avoid liability, but the erection of a sewer (rendered necessary by street improvements) of such incapacity that every sane man knows in advance that it will not afford any relief from the consequences of obstruction to the natural drainage caused by the filling of the street, would be dispensing with the use of common sense, and by no means consistent with that reasonable care which the law requires. It would, indeed, be carelessness most gross and wanton—not merely an error of judgment, but a failure to exercise judgment at all.

The action of the court below in allowing witnesses, not experts, to give their opinion as to the capacity of the sewer is questioned. The rule is, that any witness, not an expert, who knows the facts personally, may give an opinion in a matter requiring skill, stating also the facts upon which he bases that opinion. But in this case it could scarcely be called an opinion which the witnesses gave, but a fact. They had seen that the sewer would not pass the water in time of floods. It did not require an expert, with such a fact within his own knowledge, to say that the sewer was too small.

Reversed, with costs; cause remanded for a new trial.

B. K. Elliott, for appellant.

J. T. Dye and A. C. Harris, for appellee.

Fitzenrider v. The State.

FITZENRIDER v. THE STATE.

LIQUOR LAW.—*Statute Construed.*—The ninth section of the liquor law of 1859 (1 G. & H. 616) applies to unlicensed as well as licensed retailers.

CRIMINAL LAW.—*Joint Offense.*—*Acquittal of one Defendant.*—The acquittal of one of two defendants charged with a joint offense does not operate as an acquittal of the other.

SAME.—*Bill of Exceptions.*—The defendant in a criminal prosecution was allowed by the court a period extending beyond the term, in which to file his bill of exceptions, which was filed in the clerk's office within the time so allowed, but not till after the expiration of the term.

Held, that, in the absence of anything to the contrary, this showed it was not presented to the judge within the time allowed by law, which requires that it be so presented at the time of the trial, or within such time during the term as the court may allow.

APPEAL from the Jennings Common Pleas.

GREGORY, J.—Barbary Brown filed her affidavit before the Mayor of the town of Vernon, charging that on, &c., at, &c., Herman Fitzenrider and Albert Leiffler did unlawfully and knowingly sell intoxicating liquor to one Benjamin Brown, the said Benjamin being then and there a person who was in the habit of being intoxicated, and after notice had been given to them, the said Herman Fitzenrider and Albert Leiffler, by Barbary Brown, the wife of the said Benjamin, that the latter was a person in the habit of being intoxicated. Leiffler was acquitted on the trial before the Mayor; Fitzenrider was convicted. The latter appealed to the court below. The defendant moved to quash the affidavit; the motion was overruled. This presents the first question in the case.

The statute provides that “Every person who shall, directly or indirectly, knowingly sell, barter, or give away any intoxicating liquor to any person who is in the habit of being intoxicated, after notice shall have been given him by the wife, child, parent, brother or sister of such person, or by the overseer or overseers of the poor of the township where he resides, that such person is in the habit of being intoxicated, shall be deemed guilty of a misdemeanor, and

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upon conviction thereof, shall be fined," &c. 1 G. & H. 616, sec. 9.

It is argued that this statute only applies to licensed retailers. The section defining the offense is general in its terms, and there is nothing in the act to which the section belongs limiting its operation. The section can be violated as well by an unlicensed as a licensed retailer.

It is claimed that an acquittal of one of the defendants operated as an acquittal of the other. There is nothing in this position.

A motion for a new trial was made and overruled. There is an attempt to set out the evidence by a bill of exceptions.

The trial was had on the 3d of June, 1867, the second day of the June term of the Jennings Common Pleas Court. The time fixed by law for that term was two weeks. The court gave the defendant thirty days within which to file his bill of exceptions. It was filed in the clerk's office on the 1st of July. There is nothing in the record showing that it was signed at an earlier period.

In *Stewart v. The State*, 24 Ind. 142, this court held, that in criminal prosecutions the bill of exceptions must be made out and presented to the judge at the time of the trial, or within such time as the court may allow, during the term.

In the case at bar, the defendant was allowed by the court thirty days within which to file his bill of exceptions, a period extending beyond the term; the bill was not filed until after the expiration of the term. In the absence of anything to the contrary, this shows that the bill was not presented to the judge within the time allowed by law. The evidence is therefore not before this court.

The judgment is affirmed, with costs.

J. Bundy, for appellant.

D. E. Williamson, Attorney General, for the State.

Marlett v. Wilson's Executor.

MARLETT v. WILSON'S EXECUTOR.

BOND.—*Repugnant Condition.*—Effect will be given to the intention of the parties to a bond as indicated by the whole instrument, notwithstanding repugnant words in the condition.

BASTARD.—*Bond for Maintenance of.*—An obligation for the maintenance of a bastard, executed to the putative father, accrues exclusively to the benefit of the child, who may maintain a suit thereon in equity.

SAME.—*Liability of Father.*—The only legal liability of the father for the maintenance of his illegitimate child is for such judgment as may be rendered against him in a prosecution for bastardy under the statute.

APPEAL from the Warren Common Pleas.

FRAZER, J.—The facts shown by the complaint in this case were, that Wilson, the testator, for a valuable consideration, contracted with one Waymire (who was at the time prosecuted for bastardy by a daughter of Wilson) to maintain and support the bastard, which he afterwards failed to do. The child brought suit upon a penal bond of Wilson for one hundred and fifty dollars, which recites the facts and contains the agreement as stated above, acknowledges the receipt of seventy-five dollars "to support the child," releases Waymire from any action or right of action in favor of Wilson against Waymire in consequence of the latter having begotten Wilson's daughter with child, and concludes thus: "Now, if the said Wilson shall save the said Waymire harmless from all damages in supporting, maintaining, and educating said bastard child, from all suits that may be hereafter brought against him on account of his having begotten a bastard child on the body of Isabella Wilson, then the above obligation to be null and void; else, to be and remain in full force and virtue in law."

The instrument is awkwardly framed, and was probably drawn by some one who had a slight knowledge of legal forms, and but little conception of their signification. It is contended that the very formal condition with which it closes confines the contract to the matters therein, and that Wilson could therefore be held only to indemnify Waymire

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from damages which might accrue against him personally for the support and education of the child, and also to indemnify him from suits which might be prosecuted against him on account of his having begotten the child. This construction would effectually nullify the express release by Wilson of rights of action in his own favor, and also his express contract to maintain the child, unless, indeed, a prosecution for bastardy against Waymire should fix the liability of the latter for such support. This would be disregarding the substance of the instrument for the sake of its form, and would, it seems to us, defeat the intention of the parties, as indicated by the whole instrument. Its purpose was, not only to indemnify Waymire against such liability as might be made incumbent upon him, but also to release any right of action held by Wilson against him, so that the release might be pleaded, and also to secure an actual maintenance to the child, and for its benefit. This effect can be given to the instrument, notwithstanding the repugnant words of the formal condition, and will, we think, be abundantly supported by authority. Thus, in *Stockton v. Turner*, 7 J. J. Marsh. 192, where the condition was, "if the obligor do not pay," &c., it was held, notwithstanding the negative expression, that the affirmative was intended. So in *Gully v. Gully*, 1 Hawks, 20, it was ruled that insensible and contradictory words in the condition of a bond will be rejected, so as to effectuate the intention of the parties. See, also, *Wells v. Wright*, 2 Mod. 285; *Wells v. Tregusan*, 2 Salk. 463; *Shep. Touch.* 88.

It remains to consider whether the plaintiff, the child, could maintain the suit, she not being a party to the contract. We have intimated that the agreement to maintain was for her benefit. It was so, unquestionably. Her putative father could derive no benefit from it. He would not be legally liable for her maintenance to those furnishing necessaries to her. His liability would only be for such judgment as might be rendered in a prosecution for bas-

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tardy under the statute, and if no such judgment was obtained there would be no liability whatever upon him. The natural obligation of the father to maintain his bastard offspring cannot be enforced as in the case of a legitimate child. The question of paternity must be settled by proceedings for that purpose, and such proceedings determine the whole extent and fix the limits of his legal obligation. The contract to indemnify against any judgment was for the father's benefit, but that for the maintenance of the child was for the exclusive benefit of the latter, and we may suppose that a sense of natural duty inspired it. In such cases there is, in other states, much conflict of decision upon the question whether a party, not known as a contracting party, for whose benefit the contract was made, may maintain a suit upon it in equity, it being generally conceded that at law he cannot for want of privity. In this State we regard the question as settled in the affirmative. *Bird v. Lanius*, 7 Ind. 615; *Allen v. Davison*, 16 Ind. 416; *Devol v. McIntosh*, 28 Ind. 529; *Beals v. Beals*, 20 Ind. 163; *Lamb v. Donovan*, 19 Ind. 40; *Davis v. Calloway*, at this term, *ante* 112.

We think, for the foregoing reasons, that the court below erred in sustaining a demurrer to the complaint.

The judgment is reversed, with costs.

J. McCabe, for appellant.

J. Park and L. T. Miller, for appellee.

GRIFFIN and Another v. Cox.

PLEADING.—*Justice of the Peace.*—A complaint filed before a justice of the peace was a promissory note indorsed by the payee, whereby the defendant promised to pay him "one hundred & $\frac{50}{100}$ "
Held, that this was sufficient as a complaint.

The Indianapolis, Cincinnati, and Lafayette Railroad Company v. Trisler.

Set-Off.—A set-off in favor of one of two makers of a promissory note, both being principals, pleaded by him in answer to a suit on the note against the makers, is bad on demurrer.

APPEAL from the Boone Circuit Court.

FRAZER, J.—This case originated before a justice of the peace. The complaint filed was a promissory note against the appellants, indorsed by the payee, whereby they promised to pay him “one hundred & $\frac{1}{3}$.” The first question is, whether this was sufficient as a complaint. We find no difficulty in solving this inquiry by an affirmative decision. The utmost liberality must, for the purposes of justice, be tolerated in the pleadings before a magistrate’s court, else every good purpose intended by the creation of that tribunal will be defeated.

A set-off in favor of one of the makers of the note was pleaded by him, both makers being principals. It was plainly right to sustain a demurrer to it.

The judgment is affirmed, with ten per cent. damages and costs.

C. C. Nave, for appellants.

O. S. Hamilton and *C. C. Galvin*, for appellee.

THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD COMPANY v. TRISLER.

EVIDENCE.—Weight of.—*Supreme Court.*—It is not the province of the Supreme Court to weigh the evidence and determine the preponderance thereof. Before it will interfere upon the evidence alone, it must appear by the record, not merely that the finding was against the weight of evidence, but that it was wrong beyond any question whatever.

APPEAL from the Decatur Common Pleas.

FRAZER, J.—This case is here upon the evidence. The

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evidence upon one point was not, as it is given to us by a bill of exceptions, of the most satisfactory character. There was, however, evidence sufficient to put it out of our power to interfere.

The appellant argues the case as if this court were to weigh the evidence and determine the preponderance thereof. Such is not our province. It must appear by the record, not merely that the finding below was against the weight of evidence, but that that finding was wrong beyond any question whatever, before we can interfere upon the evidence alone.

The judgment is affirmed, with ten per cent. damages, and costs.

W. Cumback, S. A. Bonner, and J. D. Miller, for appellant.
B. W. Wilson and W. H. Carroll, for appellee.

PERRY and Another v. ROBERTS.

VENDOR'S LIEN.—Assignment of.—Married Woman.—It is well settled in this State that the assignment of a note given to secure the purchase money of real estate carries with it the vendor's lien on the property; and it makes no difference that the payor is a married woman at the time of the execution of the note.

SAME.—Covverture.—Covertura is no bar to a suit to enforce a vendor's lien on real estate for unpaid purchase money.

APPEAL from the Switzerland Common Pleas.

GREGORY, J.—This suit was commenced by one John W. Bledsoe against Kezia B. Perry and Robert A. Knox, on notes and mortgage, executed by Perry to Knox, for the purchase money of the mortgaged premises, and by the latter assigned to the plaintiff. During the progress of the suit the cause of action was transferred by assignment to

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the appellee, who was allowed by the court below to be substituted plaintiff in the action.

The complaint, as finally amended, is in two paragraphs; the first, for the vendor's lien; the second, on the notes and mortgage.

Kezia B. Perry demurred to the complaint, which was overruled. She then answered, 1st, the general denial; 2d, coverture; 3d, that the transfer of the vendor's lien was made after the suit was commenced.

Demurrers were sustained to the second and third paragraphs of the answer. Trial by the court; finding for the plaintiff, and final decree. The evidence is not made a part of the record.

The point made on the demurrer to the complaint is the same as that raised by the demurrer to the third paragraph of the answer. The notes and mortgage were transferred by assignment before the commencement of the action, but as the mortgagor was a married woman at the time of their execution, some doubts arose as to whether this assignment transferred the vendor's lien. To obviate this difficulty, Knox, the mortgagee, after the commencement of the action, executed to the plaintiff Bledsoe a formal instrument of assignment of the vendor's lien.

It is well settled in this State that the assignment of a note given to secure the purchase money for real estate, carries with it the vendor's lien on the property. *Kern v. Hazlerigg*, 11 Ind. 443; *Fisher v. Johnson*, 5 Ind. 492; *Brumfield v. Palmer*, 7 Blackf. 227.

It can make no difference in principle that the payor is under disability of coverture.

The court committed no error in overruling the demurrer to the complaint, and in sustaining the demurrer to the third paragraph of the answer.

Coverture was pleaded in bar of the whole action. It was no defense to the vendor's lien. The court, therefore, was right in sustaining the demurrer to the second paragraph of the answer.

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The decree was for a foreclosure of the mortgage. In the absence of the evidence, we must presume in favor of the action of the court below. Such a decree was proper under the issue made on the second paragraph to the complaint.

The judgment is affirmed, with costs and five per cent. damages.

A. C. Downey, for appellants.

S. Carter, for appellee.

MAHONY and Another v. HUNTER'S Executor.

PROCEEDING SUPPLEMENTARY TO EXECUTION.—Contract.—Fraud.—Proceeding supplementary to execution under section 522 of the code, by the executor of A., execution plaintiff, against B., execution defendant, and C., alleged to be indebted to B. in an amount which, with other property of B. exceeded the amount exempt by law. It appeared in evidence, that B. had recovered a certain judgment payable in annual installments which he had assigned to C. upon the record, in consideration of which C. had agreed with B. to board, lodge, and take care of him for seven years, furnish him expense money, and pay a certain judgment against B.; that before service of notice on C. in this case he had sold the judgment so assigned to him to one D. for a valuable consideration; that in fulfilment of his contract C. had boarded and taken care of B. one year and eight months, and had paid the judgment against B. as agreed, and certain other sums to and for B.; that C. had the remainder of the judgment assigned to him by B.; that B. was not a resident householder; that C. had no property belonging to B. and was not indebted to him except his obligation to board, keep and take care of him under said contract.

Held, that in the absence of evidence of the disability of either of the parties to make the contract, it was valid and binding between them, and C. was only bound for the performance thereof according to its terms, or for damages for a breach of it should he fail to perform it.

Held, also, that the facts that the contract was of an unusual character and that a judgment was soon afterwards rendered against B. might throw suspicion on the good faith of the transaction on the part of B., but they did not establish fraud, especially on the part of C.

SAME.—Trustee.—In the same entry with the judgment assigned by B. to C. the latter was appointed trustee for the former, to hold in trust for him the

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moneys and property therein adjudged to B. and required to give bond to B.; "to become trustee at the time when, and on the condition that he give bond," &c.

Held, that in the absence of proof that C. in fact became trustee he was not by this provision disabled from making the contract for the assignment of the judgment to himself.

APPEAL from the Ripley Circuit Court.

ELLIOTT, J.—This was a proceeding supplemental to execution, instituted by Morton C. Hunter, executor, &c., against the appellants, Minor and Mahony, under section 522 of the code. The sworn statement on which the proceeding is based alleges, that on the 2d day of March, 1866, John Hunter, the decedent, recovered judgment against Minor in the Ripley Circuit Court for \$264.56 and costs of suit, taxed at six dollars and fifteen cents; that afterwards an execution was issued on the judgment, and placed in the hands of the sheriff of said county, who subsequently returned it, "no property found whereon to levy;" that Mahony is indebted to said Minor in the sum of four hundred dollars, which, with other property of Minor, exceeds the amount exempt by law from execution; and prays that Minor may be required to appear and answer as to his property, and Mahony as to his indebtedness to Minor. Mahony filed an answer under oath, which states that he has no property belonging to Minor, and is not indebted to him, except in the manner following:—That at the November term, 1865, of the court of Common Pleas of said county, said Minor, in a suit then pending in said court between him and his wife, Mary E. Minor, recovered a judgment against her for \$1,000, \$200 of which was due at the date of the decree and \$200 annually thereafter, until the whole should be paid; that on the 1st of February, 1866, Minor assigned said judgment to him, Mahony, on the record thereof, and delivered to him certain articles of personal property of the value of \$25. In consideration of which he agreed with Minor to board, lodge, and take care of him for the term of seven years, and to furnish him ex-

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pense money, and to pay a judgment against Minor for \$149.50; that afterwards, and before the service of notice on him in this case, he sold the judgment, so transferred to him by Minor, to one William Johnson, for a valuable consideration; that in fulfillment of the contract with Minor, he has boarded and taken care of him one year and eight months, and has paid him besides the sum of \$85, and has also paid the judgment of \$149.59, and has paid the further sum of \$15.17 to one Roberts, a constable, for Minor; that he has the remainder of said judgment, after deducting the amounts so paid out, amounting to about \$700, from which the value of Minor's boarding and care, which is claimed to be worth \$700, should be deducted. He denies all fraud, and claims that he is in no wise indebted to Minor, except his obligation to board, keep and take care of him under said contract.

The answer of Minor is to the same effect as that of Mahony.

On the final hearing the court found for the plaintiff, and that the defendant Mahony, at the commencement of the proceedings, was indebted to Minor in a sum more than sufficient to satisfy the plaintiff's judgment, over and above the amount exempt by law from execution, and that there was then due on the plaintiff's judgment against Minor the sum of \$304.20, and \$6.15 his costs therin. Motions for a new trial were made and overruled; and thereupon the court ordered that Mahony pay into the court, within ninety days, for the use of the plaintiff, \$304.20, with interest from the date of the order, and \$6.15, the costs on said judgment, and, in default thereof, that an execution issue against his property for the collection of the same.

Overruling the motions for a new trial is assigned for error, and one of the reasons filed for a new trial is, that the finding of the court is contrary to the evidence.

The evidence is made a part of the record, and does not, in our judgment, sustain the finding and order of the court. It consists simply of the judgment in favor of John Hunter

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against Minor, referred to in the plaintiff's affidavit; the execution issued thereon and its return of no property found; the answers of the appellants, the substance of which is hereinbefore stated; the judgment for \$1,000 in favor of Minor against his former wife, and the assignment thereof to Mahony on the 2d of February, 1866; and the admission of record that Minor "was not a resident householder." The judgment of John Hunter against Minor was rendered on the 2d of March, 1866, just a month after the assignment of the judgment in favor of Minor to Mahony. The entry of the judgment of Hunter against Minor from the order book was alone given in evidence, and hence it does not appear that the suit was even pending at the time of the assignment of the judgment by Minor to Mahony. If Minor and Mahony were capable of making the contract for the assignment of the judgment set up in their answers, and there is no evidence of the disability of either of them, it was certainly competent for them to do so, and, as between them, the contract is valid and binding, and Mahony is only bound for the performance thereof according to its terms, or for damages for a breach of it, should he fail to perform it. If Minor was indebted at the time of the assignment of the judgment to Mahony, the evidence fails to show it, and especially does it fail to show that Mahony had any notice of such indebtedness.

The facts that the contract in which the judgment was assigned was of an unusual character, and that a judgment was soon afterwards rendered against Minor, may throw a suspicion upon the *bona fides* of the transaction, on the part of Minor, but they do not establish fraud, and especially on the part of Mahony.

In the same entry, and immediately following the rendition of the judgment in favor of Minor for \$1,000, which he assigned to Mahony, is the following provision: "And it is further considered and adjudged, with the consent of said William Minor, that Turner D. Mahony be appointed trustee for the said Minor, to hold in trust for him the moneys

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and property herein adjudged to him, the said Minor, and give bond in the sum of \$1,500 to said Minor, to become said trustee at the time when, and on the condition that he give bond in the sum of \$1,500 for the faithful discharge of his duties." And it is insisted, on the part of the appellee, that it was a violation of the spirit of the trust for Mahony, the trustee, to procure from Minor an assignment of the judgment to himself, and thereby discharge the trust, and as he subsequently sold and transferred the judgment, he would be compelled in equity to account to Minor for the proceeds. It is not necessary that we should examine or decide upon the correctness of this proposition, as the evidence does not show that Mahony, in fact, ever became such trustee. He was not a party to that suit. His appointment by the court was upon the express condition that he should execute a bond in the sum of \$1,500. He was not bound to accept the trust, and it is not shown by the evidence that he ever did accept it, or execute the bond, which was a condition precedent to his becoming such trustee.

The judgment is reversed, with costs.

H. W. Harrington, for appellants.

L. Howland, for appellee.

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30 250
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THE AMERICAN EXPRESS COMPANY v. HOCKETT.

COMMON CARRIERS.—*Delivery of Goods.*—*Termination of Liability.*—As a general rule common carriers by land are bound to deliver the goods to the consignee at his residence, or his place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery; nor is it sufficient that they are left at the public office of the carrier, unless by express permission, or a usage so established and well known as to be equivalent to such permission. But if the consignee is absent, and the carrier, after diligent inquiry, cannot find him or ascertain the place of his residence or business, then the liability as a carrier is deemed at an end; but it is the

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duty of the carrier to take care of the goods, by holding them himself, or depositing them with some suitable person for the consignee, and, in such case, the person holding the goods becomes the bailee of the owner or consignee, and is only bound to reasonable diligence.

SAME.—*Express Companies.—Negligence.*—Suit against an express company for the value of a package of money received by it to be carried and delivered to the plaintiff, which it failed to do. Answer, that the package was duly received at the office of defendant at the town to which it was directed; that defendant upon inquiry could not find the residence of the plaintiff to be in said town or its vicinity, and, being ignorant of his real place of residence or post-office address, the defendant, on the day of the arrival of said package, wrote a notice informing the plaintiff of its arrival at said office and that it was ready for delivery, and inclosed said notice in an envelope addressed to the plaintiff at said town and duly stamped, and dropped the same into the post-office at said town, and placed said package in a safe owned by the defendant, wherein the defendant kept all money packages arriving by express for parties, and safely locked the same, the package remaining thus securely locked up for several days, and no one calling for it till it had been stolen by burglars, who in the night time violently broke into the office of defendant, where said safe was, and, without the knowledge of defendant, broke open said safe and feloniously stole, took, and carried away said package of money, without any fault or neglect of the defendant.

Held, that the facts alleged in the answer were not sufficient to discharge the express company from liability as a common carrier, and that if they could be so deemed, still, the answer failed to show that the defendant exercised reasonable care with the package as bailee after the termination of such liability.

APPEAL from the Madison Common Pleas.

ELLIOTT, J.—Hockett sued the American Express Company to recover the value of a package containing one hundred dollars in currency, received by the company at Chillicothe, Missouri, to be carried and delivered to Hockett at Andersontown, Indiana, which the company failed to do.

An answer was filed, to which a demurrer was sustained, and the company excepted. On a refusal of the company to answer further, judgment was rendered for Hockett. The company appeals. The ruling of the court on the demurrer to the answer presents the only question in the case.

The answer alleges "that the package of money mentioned in the complaint was duly received at the office of the defendant, in Anderson, Madison county, Indiana. The

The American Express Company v. Hockett.

defendant upon inquiry could not find the residence of said plaintiff to be in said town of Anderson, or in the vicinity; and, being ignorant of the real place of residence or post-office address of said plaintiff, the said defendant, on the day of the arrival of said package, wrote a notice informing the plaintiff of the arrival of said package of one hundred dollars at the said office of said defendant, and that the same was ready for delivery, and then and there inclosed the said notice in an envelop indorsed, "Jonathan Hockett, Anderson, Indiana," and then and there duly stamped the same, and, when so directed and stamped, dropped the same into the post-office at Anderson; and then and there placed said package of money in a safe owned by the defendant, wherein said defendant placed and kept all money packages arriving by express for parties, and then and there safely locked the same; said package remaining in said safe thus securely locked up for several days, no one calling for the same until after said package had been stolen by thieves and burglars, who in the night time, violently broke into the office of said defendant, where said safe was situate, and, without the knowledge of said defendant, broke open said safe and feloniously stole, took, and carried away said package of money, without any fault or neglect of the defendant, &c.

Express companies, in this State, are declared by statute (1 G. & H. 327) to be "common carriers, and subject to all the liabilities to which common carriers are subject according to law." As a general rule common carriers by land are bound to deliver the goods to the consignee at his residence, or place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery. Nor is it sufficient that they are left at the public office of the carrier, unless by express permission, or a usage so established and well known as to be equivalent to such permission. 1 Par. Con. 660 (3d ed.). Goods carried by railroad companies form such an exception. *Bansmer v. Toledo, &c. R. R. Co.*, 25 Ind. 434. But if the consignee is absent, and the carrier after diligent inquiry cannot find him, or ascer-

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tain the place of his residence or business, then the liability as carrier is deemed at an end; but it is the duty of the carrier to take care of the goods, by holding them himself, or depositing them with some suitable person for the consignee, and in such case the person holding the goods becomes the bailee of the owner or consignee, and is only bound to reasonable diligence.

The answer in this case alleges that the defendant, "upon inquiry" could not find the residence of the consignee to be in the town of Anderson, or in the vicinity, and being ignorant of his real place of residence or post-office address, &c. The inference from the answer is, that the inquiry, whatever it was, was made of some one at defendant's office, for it seems that immediately after the arrival of the package the inquiry was made, the package deposited in the safe, and the notice prepared to be dropped in the post-office. But if not made there, where and of whom was it made? Did the agent of the company who made it content himself with asking the first person he met, whether resident or stranger, or did he make the inquiry of several, or, in other words, did he make diligent and careful inquiry to ascertain the residence of the consignee? The law required this to be done, but the answer does not aver that it was done. Again, the answer does not aver that the plaintiff, or his place of business, if any, could not easily have been found. For aught that appears in the answer, the consignee may have had an office or place of business in Anderson, where he could readily have been found.

Nor does the answer show that reasonable care was taken of the package. It alleges that it was deposited in a safe in the company's office, in which other money packages received by the company were deposited, and the safe securely locked, where it remained until the office and safe were broken open by burglars and the package stolen, without the knowledge of the company. What was the character of the office building? Was it so constructed and guarded as to make it a reasonably safe place in which to

Ex parte Halpine.

leave money packages unguarded? The answer is silent in this respect, and we cannot infer that it was an appropriate or safe building for such a purpose. Nor does it appear that the safe in which the money was deposited was such that persons of ordinary prudence would have risked in it such deposits. It is called a safe, yet, for anything shown by the answer, it may have been an insecure wooden box. The building was unguarded, and if, as alleged in the answer, the company was accustomed to leave the money packages, received in the course of its business, deposited there, it might reasonably be expected that thieves and burglars would closely scrutinize its condition, and common prudence would require that either the building or the safe should be such as would likely resist such an attack; but there is nothing in the answer showing that such was the character of either. So that if the facts alleged in the answer could be deemed sufficient to discharge the appellant from liability as a carrier, still, it fails to show that it exercised reasonable care with the package as bailee. It follows that, in any view of the case, the answer is bad, and the demurrer to it was correctly sustained.

The judgment is affirmed, with costs.

J. Davis, for appellant.

J. A. Harrison, for appellee.

Ex PARTE HALPINE.

MURDER.—*Habeas Corpus*.—*Bail*.—*Evidence*.—Upon an application by writ of *habeas corpus* by one indicted for murder in the first degree to be admitted to bail, it having appeared in evidence that the deceased kept a saloon; that the prisoner on the same evening had taken several drinks of whisky just before he came to the saloon of the deceased and entered the same, where he remained about two hours before the commission of the fatal act; and that during that time he took a number of drinks of beer, and was somewhat

Ex parte Halpine.

intoxicated; the prisoner, at the proper time, introduced a witness who testified that he knew the deceased, and had often bought liquor of him. The prisoner then offered to prove by said witness that he, the witness, had frequently bought liquor of the deceased about and just before the time of said homicide; that the liquors which were kept and there offered for sale by the deceased were of a poisonous and noxious character; that they fired the brain of the witness and made him wild; and that once, while under the influence thereof, he was so frenzied thereby that he came near killing his own father by violence.

Held, that the offered evidence was properly rejected.

APPEAL from the Judge of the Floyd Common Pleas.

ELLIOTT, J.—Halpine was indicted in the Clark Circuit Court for murder in the first degree. The case was taken, on a change of venue, to the Floyd Circuit Court, in which county Halpine was in the custody of the sheriff, and imprisoned in the jail thereof, on said indictment, and sued out a writ of *habeas corpus* before the Judge of the Court of Common Pleas of said county, for the purpose of being let to bail. Upon the return of the writ, the issue of fact formed and tried was, whether the proof was evident and the presumption strong that the prisoner was guilty of murder. The issue was found against the prisoner, and he was remanded to jail, and appeals to this court.

Upon the hearing below, it appeared in evidence that Menck, the deceased, kept a saloon in Jeffersonville; that the prisoner, on the same evening, and just preceding the time when he came to the saloon of the deceased, had taken several drinks of whisky before he entered the saloon of the deceased, where he remained about two hours before the commission of the fatal act; and that during that time he took a number of drinks of beer, and was somewhat intoxicated. And the prisoner, at the proper time, introduced one John Frank as a witness, who testified that he knew the deceased, and had often bought liquor of him. The prisoner then offered to prove by said witness that he, the witness, had frequently bought liquor of the deceased about and just before the time of said homicide; that the liquors which were kept and there offered for sale by the deceased

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were of a poisonous and noxious character; that they fired the brain of the witness and made him wild; and that once, while under the influence thercof, he was so frenzied thereby that he came near killing his own father by violence. But the judge refused to hear the evidence, and that refusal is assigned for error.

We think the evidence was properly rejected. Aside from the fact that it was not proposed to show that the liquor referred to was even of the same description as that drank at the deceased's by the prisoner—beer—the evidence, in its very nature, did not reasonably tend to either establish or disprove any material fact involved in the case. It could, at most, but open a wide field of speculation, without tending to any certain or satisfactory conclusion. It may, perhaps, be said of all liquors that intoxicate, that, with many at least, they fire the brain, inflame the passions, and incite to crime, as the records of our courts too often show.

The only remaining error assigned is, that the evidence does not sustain the finding of the judge, and the refusal to let the prisoner to bail.

The evidence is somewhat lengthy, and a review of it in this opinion could answer no beneficial purpose, and might possibly tend to prejudice the rights of the prisoner on a final trial. We have given it a careful and attentive examination, and do not find it of such a character as to justify us in reversing the judgment of the judge below in refusing to let the prisoner to bail.

The judgment must therefore be affirmed.

The judgment is affirmed, with costs.

J. H. Stotsenburg, T. M. Brown, and J. G. Howard, for appellant.

D. E. Williamson, Attorney General, and R. M. Weir, for the State. •

Lewis and Others v. Lewis.

LEWIS and Others v. LEWIS.

PRACTICE.—New Trial.—Rejection of Evidence.—Where the court below refuses to permit a question to be answered by a witness, the bill of exceptions must show the particular facts expected to be elicited, so that the Supreme Court may judge of their materiality; otherwise the error is not available.

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138	596
30	257
149	319
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169	392

APPEAL from the Posey Circuit Court.

GREGORY, J.—James Lewis commenced his action in the court below against Furney Lewis, James T. Lewis, and David F. Lewis, to subject to execution certain real estate, conveyed to James T. and David F., on the 28th of January, 1861, by one Thomas Fletchall and wife, on the ground that it was purchased by Furney Lewis, who procured the conveyance to be made to defraud his creditors. James Lewis and Furney Lewis entered into partnership in the dry goods business on the 1st of April, 1859, and dissolved their relation as partners in October, 1860. At the time of the dissolution, the firm was in debt some three thousand dollars. James Lewis was compelled to pay this debt, and, in a suit by him against Furney Lewis, he recovered, for and on account thereof, a judgment for one thousand one hundred and sixty-three dollars and ninety cents, on which it is sought to subject the land in controversy to sale on execution. The real estate was purchased by Furney Lewis, who caused it to be conveyed to his minor sons, his co-defendants, for the purpose, as he testifies, of avoiding the payment of a debt for which he was surety.

The bill of exceptions states that “the defendants offered to prove by the plaintiff the amount and value of the partnership means of F. Lewis & Co. (the firm composed of the plaintiff and defendant Furney), owned by the firm at the date of the execution of the deed of Fletchall and wife to James T. and David F. Lewis, and what disposition was made of such means by James Lewis, the plaintiff; and also offered to prove by him how much means the firm had at

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the time such partnership was dissolved, and the amount of partnership debt at that time, and what disposition was made of such means by the plaintiff; to the introduction of which the plaintiff objected." The court sustained the objection, and this was one of the grounds for the motion for a new trial.

In *The Toledo and Wabash Railway Company v. Goddard*, 25 Ind. 185, it was held that where the court below refuses to permit a question to be answered by a witness, the particular facts expected to be elicited must be shown, in order that this court may judge of their materiality. If this is not done, the error is not available.

In the case at bar, the bill of exceptions fails to show the particular facts expected to be elicited. We have looked through the evidence, and think that the verdict is well sustained. The court below committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

W. Harrow, for appellants.

C. Denby, E. M. Spencer, and W. Loudon. for appellee.

KAUFMAN and Another v. DICKENSHEETS.

JUDGMENT.—*Compromise of.*—Money paid in satisfaction of a judgment, on a settlement and compromise of such judgment and of the subject of litigation, cannot be recovered back upon the reversal of the judgment by the Supreme Court.

APPEAL from the Pulaski Common Pleas.

FRAZER, J.—This was a suit by the appellee against the appellants, to recover back money paid by the plaintiff to the defendants in satisfaction of a judgment held by the latter against the former, which was subsequently reversed

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by this court. See 28 Ind. 251, and also S. C. 29 Ind. 154. Proper issues being formed, it appeared by the evidence, without controversy, that the judgment was satisfied by a compromise, in which the present appellants, in order to avoid further litigation, which was threatened by an appeal to this court, agreed to accept, and did accept the note of a third person, due in ninety days, and the plaintiff agreed not to prosecute an appeal. In a word, there was a settlement and compromise, not only of the judgment, but of the subject of litigation. On this evidence there was a finding for the plaintiff. The case is here on the evidence.

Cannot a controversy be compromised as well after a judgment as before, and further litigation be thus avoided? And is not the arrangement just as valid? The question is too plain to justify discussion. It could only be by confounding questions altogether dissimilar, and applying language used in one connection to another subject entirely out of mind when that language was employed, that what we said in 29 Ind. could have misled anybody into the belief that money paid under the circumstances shown by this evidence could be recovered back.

The judgment is reversed, with costs; cause remanded for a new trial.

D. P. Baldwin, for appellants.

ONSTATT *v.* REAM.

PLEADING.—*Replevin.*—Complaint in replevin before a justice of the peace in the usual form, for “one white shoat of the value of fourteen dollars.” *Held*, that the description of the property was sufficiently specific.
PRACTICE.—*Evidence.*—In the absence of a contrary showing, the Supreme

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Court will presume that the evidence was introduced in its proper order on the trial, and was relevant.

SAME.—There is no error in refusing to allow the defendant to introduce testimony in reply to strictly rebutting evidence introduced by the plaintiff.

APPEAL from the Wabash Common Pleas.

GREGORY, J.—This was an action of replevin commenced before a justice of the peace by Ream against Onstatt. The complaint averred that the plaintiff was the owner of, and entitled to the possession of, one "white shoat" of the value of fourteen dollars, of which the defendant had the possession, without right, which was unlawfully detained from him by the defendant, and that the same had not been taken by virtue of any execution or other writ against the plaintiff. The appellant moved in the court below to set aside the cause of action, because, as was alleged, the description of the property in controversy was not specific enough.

In *Pope v. Tillman*, 7 Taun. 642 (2 Eng. Com. L. 243), GIBBS, C. J., in speaking for the court, says: "I would not give judgment in this case, without stating that the court have not failed to advert to a case in the time of Lord HARDWICKE, in which it was held that a count for taking a certain parcel of flax, and a certain parcel of paper, was good; and another case, in which the taking fourteen skimmers and ladles, was held sufficient; but there was something to guide the party; here is nothing whatever to guide the party as to the nature of the goods taken."

The description in that case was "divers goods and chattels of the plaintiff." In the case at bar, the number and nature of the property and its value are stated. It is true that no means is afforded by the description by which it could be distinguished from any other white shoat. Mr. CHITTY says: "It must be confessed that as the description of goods or lands must in general be exceedingly similar, there is but little practical utility in this rule except as regards the description of a close by abuttals." 1 Chitty's Pl. (9th Am., from 6th London Ed.) 377. The complaint

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was good, and the description of the property sufficiently definite.

There are objections taken to the admission of evidence, on the ground that it was not introduced in its proper order, and for irrelevancy; but the evidence given in the cause is not made a part of the record, and it is impossible, from the part of the testimony given, to determine whether it was rebutting or relevant. We must presume, in the absence of a contrary showing, that the court below did right. If the evidence given was strictly rebutting, then the court committed no error in refusing to allow the appellant to introduce testimony in reply thereto.

The controversy was over the identity of a hog. Each party claimed that the shoat embraced in the suit was his. In the complication of such a question, it is easy to see that the evidence admitted over the objection of the appellant was both relevant and rebutting. If so, then there is no error in the action of the court below.

The judgment is affirmed, with costs.

J. U. Pettit, T. T. Weir, and H. S. Kelley, for appellant.

THE INDIANAPOLIS, PITTSBURGH, AND CLEVELAND RAILROAD
COMPANY v. PETTY.

NEGLIGENCE.—*Willful Injury.*—Where an injury is alleged to have been willfully done, it is not necessary that it should appear that the plaintiff's negligence did not contribute to it.

PRACTICE.—*Intendment after Verdict.*—The most liberal form of the common law doctrine of intendment after verdict should be maintained under our practice.

RAILROADS.—*Injury to Animals.—Pleading.*—In a suit against a railroad company, to recover for animals killed, the complaint averred "that the railroad aforesaid was not securely fenced in, and the fence properly maintained."

30	261
136	241
30	261
165	277

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Held, that this language may mean that the railroad was not securely fenced anywhere, and therefore imply that it was not so fenced where the animals entered upon the road; and, after verdict for the plaintiff, it is fair to assume, no objection appearing to have been made to evidence, and the evidence not being in the record, that proof of the fact thus implied was made without objection.

APPEAL from the Delaware Common Pleas.

Petty sued for the value of cattle killed by the cars of the appellant. The complaint was in two paragraphs. The first alleged the killing, &c., and averred, "that the railroad aforesaid was not securely fenced in, and the fence properly maintained by said company."

The second paragraph alleged, "that the defendant, by her agents and servants, on, &c., negligently, carelessly, and willfully, ran over, knocked down, and killed, two steers, the property of the plaintiff, of the value of three hundred and fifty dollars, by running the locomotive and train of cars of the defendant, then and there running upon the railroad of defendant in said county, upon and over said cattle, negligently, carelessly, and willfully, to the damage of plaintiff," &c.

A demurrer to the second paragraph, on the ground of the insufficiency of the facts stated, was overruled, and the defendant excepted.

Issues were formed, upon the trial of which there was a verdict for the plaintiff.

The only questions presented here are as to the sufficiency of the complaint.

FRAZER, J.—The second paragraph of the complaint was good. Where the injury is alleged to have been willfully done, it is not necessary that it should appear that the plaintiff's carelessness did not contribute to it. *L. & I. R. R. Co. v. Adams*, 26 Ind. 76.

The sufficiency of the first paragraph is questioned here by assignment of error, no such question having been made in the court below, nor in this court, upon a former appeal. See 25 Ind. 413. It is not directly shown by this paragraph

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that the animals entered upon the road where there was no sufficient fence, the averment being merely "that the railroad aforesaid was not securely fenced in, and the fence properly maintained." This language may mean that the railroad was not securely fenced anywhere, and therefore imply necessarily that it was not so fenced where the animals entered. Such liberality of construction must be indulged after verdict. 1 Chitty's Pl. 673, *et seq.* There could not have been a verdict for the plaintiff upon this paragraph without proof of the fact thus implied; and as no objection appears to have been made to evidence, and the evidence is not in the record, it is, we think, fair to assume in support of the judgment, that this proof was made without objection. The code has little toleration for the practice of concealing questions from the lower courts with a view to make them available upon vexatious appeals; and it is therefore necessary to the harmony of our practice, as a whole, as well as to the fair administration of justice, that the most liberal form of the common law doctrine of intendment after verdict shall be fully maintained.

The judgment is affirmed, with ten per cent. damages and costs.

W. March, J. A. Harrison, and J. Davis, for appellant.

C. E. Shipley, for appellee.

LARGE v. THE KEEN'S CREEK DRAINING COMPANY.

DRAINING ASSOCIATION.—Assessments.—Pleading.—In an action by a draining association to enforce payment of an assessment, the complaint need not state in terms the use for which the money is required, if it is evident from the whole complaint that it is for the construction of the drain referred to in the directors' order of payment set out in the complaint.

SAME.—Affidavit of Appraisers.—An affidavit that "the foregoing appraise-

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ment is correct to the best of our judgment," is sufficient under section 12, 1 G. & H. 304, requiring an affidavit that "the same is in all respects a true assessment to the best of their judgment and belief."

SAME.—*Description of the Drain.*—The complaint against a person not a member of the association must describe the commencement, course, and terminus of the drain.

SAME.—*Right of Way.*—The fact that the right of way has not been procured will not bar the suit.

APPEAL from the White Common Pleas.

ELLIOTT, J.—Suit by the Keen's Creek Draining Company against Large, to enforce the payment of an assessment of benefits to certain lands. The company recovered, and Large appeals. The complaint was demurred to, because it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. This ruling is assigned for error. One objection urged to the complaint is, that it contains no allegation that it had become necessary that the association should order the payment of any portion of the assessment made by the appraisers. The company was organized for the construction of three several ditches, or drains, and the complaint shows that the board of directors ordered the payment of "thirty per cent. of the assessed value of benefits to the lands affected by the middle and north ditches." The complaint does not in terms state the use for which the money was required, but we think it evident from the whole complaint that it was required for the construction of the drains referred to in the order.

It is also objected to the complaint that the assessment returned by the appraisers, which is made a part of the complaint, was not verified as the statute requires. By the affidavit appended to the appraisement, or assessment, the appraisers swear that "the foregoing appraisement is correct to the best of our judgment." The affidavit required by the statute is, that "the same is in all respects a true assessment, to the best of their judgment and belief." 1 G. & H. 304, sec. 12.

The affidavit made by the appraisers is not precisely in

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the language of the statute, but we think it sufficient. It is, in substance, the same.

Another objection is, that the complaint does not show that the proposed drains were ever located or established; nor does it describe their beginnings, courses, or termini. This objection is well taken.

Under the statute, the defendant, not being a member of the corporation, may deny that the proposed drain is of public utility, or of private benefit to him; and to enable him to make a proper issue on the subject, the complaint should at least give the commencement, course, and terminus of the drain. *West v. The Bullskin Prairie Ditching Co.* 19 Ind. 458. Here the complaint shows nothing in reference to them, except that they are in White county.

The seventh paragraph of the answer alleges that "the plaintiff appropriated his (defendant's) land for the construction of said ditch, but did not proceed in the manner required by law for the assessment of like damages in case of the construction of railroads, canals, and other similar works." Various provisions of the statute in reference to the appropriation of lands for the way of railroads and other public works, and the assessment of damages therefor, are then set out; and the paragraph concludes by averring that the plaintiff had not complied with any of the provisions of the statute so set out, wherefore it was not authorized to construct the proposed drains. The court, at first, overruled a demurrer to this paragraph; and the plaintiff replied that the drain was constructed through the defendant's land by his leave and license. A demurrer was filed to the reply, and the court, upon a reconsideration of the question, sustained the demurrer to that paragraph of the answer. This ruling is also complained of. Perhaps, as the complaint was defective, the demurrer to the answer should have been overruled, on the principle that a bad answer is sufficient to a bad complaint. But if the complaint had been good, the answer would clearly have been bad. The question of the right of way has no connection with

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that of enforcing the assessment. The company had the power to procure the right of way, either by purchase or by having the damages assessed and paying therefor, if, indeed, the question was not settled in the assessment of benefits. In any event, the fact that the right of way had not been procured would not bar the suit to compel the payment of the assessments.

The judgment is reversed, with costs, and the cause remanded, with leave to both parties to amend their pleadings.

S. A. Huff, and *D. Langdon*, for appellant.

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Liquor Law.—License.—Appeal by Remonstrators.—An appeal by remonstrators, within thirty days, from an order of the board of county commissioners granting a license to retail intoxicating liquors suspends the operation of the order.

SAME.—The appeal is taken by the filing of the bond as provided by section 32, 1 G. & H. 253. The issuing of summons, where necessary (by section 34, *id.*), is after the cause has been docketed in the court to which the appeal is taken, where it is tried as an original cause.

SAME.—Retailing without License.—Evidence.—On the trial of an information for retailing intoxicating liquor without license, proof that it was sold at a saloon in which the defendant transacted a retail liquor trade, by a person who was his servant in conducting that trade, sufficiently connected the accused with the commission of the offense.

ARRAIGNMENT.—Waiver.—By his personal appearance and agreement to submit the trial to the court the defendant waives arraignment.

APPEAL from the Tipton Common Pleas.

GREGORY, J.—Information against the appellant for retailing intoxicating liquor by a less quantity than a quart, not being licensed so to do.

A motion was made by the defendant to quash the information, which was overruled by the court. By agreement

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the case was tried by the court, and the defendant was found guilty. A motion was made for a new trial, and overruled; and exceptions were taken. The evidence is in the record.

The appellant applied to the Board of Commissioners of Tipton county, on the 3d of June, 1868, for a license to retail intoxicating liquors by a less quantity than a quart. A remonstrance was filed, and the granting of the license resisted. The order was made. The applicant, on the 4th (the next day), paid the fee, and filed the bond required by law, and received his license. The remonstrators, within thirty days after the order, appealed therefrom to the Tipton Circuit Court. The retailing charged and proved, was on the 18th of August, forty-seven days after the appeal was taken.

It is claimed that the appeal did not suspend the operation of the order granting the license. The statute authorizes an appeal to be taken within thirty days after the time the decision was made, by the filing of an appeal bond. 1 G. & H. 253, sec. 32. When the appeal is in vacation the appellant, if there be an appellee, must cause a summons to issue. *Id.* sec. 34. The case is tried on appeal as an original cause. *Id.* sec. 36. The appeal is taken by the filing of the bond; the issuing of the summons is after the cause is docketed in the court to which the appeal is taken. The appeal suspends the operation of the order.

The evidence tends to prove that the liquor was purchased of the servant of the defendant, in the saloon kept by the appellant, at the place described in the application for the license. It is claimed that this proof does not connect the accused with the commission of the offense; but we think otherwise. It is clear that the defendant kept the saloon, and transacted a retail liquor trade therein, which he himself claimed, on the trial, was authorized by the license. The person who sold it was his servant in conducting this trade.

The defendant moved in arrest of judgment. It is urged, that the judgment ought to have been arrested, for the

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reason that the defendant was not arraigned on the information. This was waived by the personal appearance of the defendant and his agreement to submit the trial to the court.

The judgment is affirmed, with costs.

ON PETITION FOR REHEARING.

An able and earnest petition for rehearing has been filed in this case, which seems to call for some special notice. It is claimed that the appeal from the order of the commissioners did not suspend the license granted to the appellant until the issuing and service of the summons required by the thirty-fourth section of the act organizing county boards, 1 G. & H. 253.

The plain provision of sec. 32 is, that the appeal shall be taken by the filing of the bond. The provision as to the summons is, "when such appeal is taken in vacation, the appellant, if there be an appellee, shall cause a summons to be sued out of the clerk's office of the court to which the appeal is taken, returnable on the first day of any term of such court next after the date thereof, requiring the appellee to appear and answer said appeal." How can it be said, with any propriety of language, that when such appeal is taken, a summons shall issue, if the summons itself is a component part of the appeal?

A strong argument is made on the inconvenience of suspending the operation of the license without notice. The applicant knows that an appeal may be taken within thirty days; for that time he sells at his peril; he must look to his power under the license.

The same argument would apply with equal force to the time between the issuing and service of the summons, leaving it to the action of the sheriff as to when the operation of the license shall terminate. By the plain reading of the statute, the purpose of the summons is, to compel the appellee to appear and answer the appeal, leaving the appeal itself to suspend the operation of the order. It may be

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that this construction of the statute will deprive the applicant of the full benefit of the license for thirty days, but the privilege to retail intoxicating liquors must be taken with all the restrictions imposed by law.

It might, perhaps, be regarded as unjust to allow an appeal, as the applicant pays his money for the license at the time it is granted; but this is a matter for the legislature, and not the courts.

The petition for rehearing is overruled.

N. R. Overman and G. W. Lowley, for appellant.

D. E. Williamson, Attorney General, for the State.

PICKENS, Administrator, *v.* HILL.

DECEDENTS' ESTATES.—*Oaths of Administrator and Sureties.*—The fact that the oath of an administrator, on taking letters, his affidavit as to the value of the decedent's property, and the affidavits of his sureties as to the value of their property, have been sworn to before a notary public, instead of the clerk, does not render the administration void.

SAME.—*Collateral Proceeding.*—If a wife die, intestate, leaving no child or any descendant thereof, and no father or mother, the husband is entitled, without administration, to the possession of property received by her from a settlement by administration, not void, of the estate of a former husband, as against a subsequent administrator of the estate of such former husband.

APPEAL from the Orange Common Pleas.

ELLIOTT, J.—Pickens, as administrator of John S. Gifford, sued Hill, to recover possession of certain personal property, which he alleged belonged to the estate of said decedent.

The answer of Hill is in three paragraphs. The first is a general denial. The others set up a claim of property in Hill, derived from his deceased wife, to which demurrers were filed and overruled.

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A reply in denial was then filed, and the issues were tried by a jury, resulting in a verdict for the defendant. Motion for a new trial overruled; and judgment.

The first question presented by the appellant is the overruling of the demurrer to the second and third paragraphs of the answer. It is insisted that those paragraphs do not contain all the necessary averments to show property in Hill. We do not find it necessary, however, to examine the objections, as the same matters of defense were available under the general denial, and hence whether these answers were technically good or not, would not change the result here, as the evidence is in the record.

The second error complained of is the refusal of the court to grant a new trial, because the verdict is not sustained by the evidence.

It appears from the evidence that John S. Gifford died, without issue, in 1864, possessed of the property in controversy. He left a will which contains these provisions, viz: "I do give and bequeath to my wife, Ruth Ann Gifford, all of my personal property; and I wish forty acres of land that I own in Effingham county, Illinois, sold, and the proceeds to go to my wife. * * * And that one-half of the household and kitchen furniture be divided with my wife's relatives, and the remaining half divided with my relatives."

After the death of Gifford the will was duly proved and admitted to probate in the Court of Common Pleas of Orange county. Letters of administration with the will annexed were granted to Ruth Ann Gifford, the widow, who executed a bond which was approved by the clerk. She filed an inventory and appraisement of the personal property, and subsequently filed a final settlement, or account current, showing that she had paid all the claims against the estate, amounting to \$260.83, and accounted for all the assets thereof, and prayed to be discharged. The report was approved by the court, and the administratrix was, by order of the court, discharged "from all further duty and liability in the premises."

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It further appears that Gifford left surviving him brothers and a brother's children, but no father or mother; that his widow, Ruth Ann, subsequently married the defendant Hill, and that she afterwards died, intestate, possessed of the property in controversy; that she did not leave surviving her a child or any descendant thereof, or father or mother. The property at her death was left in the possession of her surviving husband, the defendant, and he was entitled to it under the 26th section of the statute of descents (1 G. & H. 296). The question as to whether his title was perfect without administration on her estate does not arise in the case. His possession was good as against the claim of the appellant as administrator of John S. Gifford. If the property, as the evidence shows, was hers, the appellant was not entitled to its possession, and therefore could not maintain the action. It was the property of the defendant as the surviving husband, subject only to the payment of the debts (if any) of his deceased wife.

When the defendant offered in evidence the proceedings of the Court of Common Pleas, containing the proof of the will of John S. Gifford, the grant of letters of administration thereon, the bond of the administratrix and her oath as such, her affidavit as to the value of the property of the decedent, and the affidavits of her sureties as to the value of their property, the appellant objected to the evidence because it appeared that the administratrix and her sureties were sworn by a notary public, and not by the clerk of the court.

The objection was overruled and the evidence admitted. This ruling is also complained of. There is nothing in the objection. The failure to have the oaths referred to administered by the clerk, if erroneous, did not render the administration of the estate void, and it could not, therefore, be attacked in a collateral suit.

The property in dispute, consisting of various articles, amounts in value to between eight and nine hundred dollars; amongst which are two widths of carpet, an oil

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cloth for stand, old copper kettle, fly brush, old scissors, a large and small meat box, of the aggregate value of seven dollars and twenty-five cents. It is insisted that these articles are either household or kitchen furniture, and did not go to Ruth Ann Gifford, under the will, but constituted a part of the property that was to be equally divided between the relatives of the testator and of his wife, and for them, at least, appellant should have recovered.

Some of the articles enumerated may be classed under the head of household and kitchen furniture, but as to whether they were so held and used by Gifford at the time of his death does not appear.

It was the evident design of the testator that his administrator should not sell, but divide out the household and kitchen furniture referred to in the will amongst the relations entitled thereto. The estate was settled up by the widow, as administratrix, long before this suit was instituted, and no complaint appears to have been made, by those entitled, as to the manner in which the household and kitchen furniture had been disposed of. The object of this suit was evidently to recover from Hill the property that was devised to his deceased wife by her former husband, and we find nothing in the evidence to justify us in disturbing the verdict because of the articles enumerated above.

We think the court did right in overruling the motion for a new trial.

The judgment is affirmed, with costs.

J. & J. T. Cox, S. E. Perkins, Sr., and S. E. Perkins, Jr.,
for appellant.

A. J. Simpson, for appellee.

Malady v. McEnary.

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PLEADING.—*Complaint.*—*Prayer for Relief.*—The fact that one of the paragraphs of a complaint contains no prayer for relief does not render it insufficient, if the complaint contains a demand of the relief to which the plaintiff may suppose himself entitled.

RESULTING TRUST.—*Statute.*—If a husband fraudulently take a conveyance of real estate in his own name, the consideration having been paid by his wife, a trust thereby results in favor of the latter. The statute (1 G. & H. 651, secs. 6, 8) does not change this rule of equity.

SAME.—*Suit by Heir.*—*Witness.*—*Competency of.*—In a suit by an heir to enforce an implied trust in real estate, growing out of the taking of the title by the defendant in his own name, the purchase money having been paid by the plaintiff's ancestor, the defendant is not a competent witness for himself as to any matter occurring prior to the death of such ancestor.

SAME.—*Instructions to Jury.*—In such a suit the court, while instructing the jury, was asked by the defendant to instruct that "verbal testimony, to be sufficient to establish a resulting trust in a case like this, ought to be clear and strong." The instruction was not given as asked, but as follows: "A deed is a solemn instrument, and evidence to vary the effect expressed in it, and establish a resulting trust, must prove necessary facts by a clear preponderance."

Held, that there was no error in this.

PRACTICE.—*Withdrawal of Pleadings.*—After a new trial had been granted, the defendant asked the court for leave to withdraw his answer and demur to the complaint, which was refused.

Held, the complaint being good, that there was no available error in this ruling.

COMMON PLEAS JUDGE.—*Jurisdiction.*—A common pleas judge holding the circuit court has jurisdiction where the title to real estate is in issue.

WITNESS.—*Party called by Adverse Party.*—A party called as a witness by the adverse party, to prove a single fact, will be permitted to testify in his own behalf.

INTERROGATORIES TO JURY.—*At What Time Requested.*—After the evidence and the argument of counsel, and while the court was instructing the jury, a party requested the court to require the jury, if they should render a general verdict, to find specially in answer to certain interrogatories, and the court refused.

Held, that the refusal was proper.

APPEAL from the Warren Circuit Court.

GREGORY, J.—Mary McEnary filed a complaint against Thomas Malady in the Fountain Circuit Court, in two par-

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agraphs. The first alleges that the defendant is the widower of one Ann Malady, deceased, and the step-father of plaintiff; that the plaintiff is the only child and heir at law of said Ann; that the defendant intermarried with said Ann in 1860; that at the time of the marriage Ann had and held as her own separate property money and other personal property of the value of six hundred dollars, which she held in her own right; that it was the desire and intention of said Ann to invest the money and other property so held by her in real estate; that with a view to this object, she, in September, 1864, bargained for and purchased the real estate described in the complaint; that the purchase money was paid out of herseparate property so held by her; that the defendant, being at the time her husband, took the title by conveyance in and to the said real estate in his own name, without the knowledge or consent of the said Ann; that the defendant has ever since held the title, refusing, when requested so to do, to convey the same to said Ann; that said Ann departed this life on the 10th of January, 1866, intestate; that the defendant has, since the death of said Ann, held and retained possession of the real estate, and refuses to convey the same, or any part thereof, to the plaintiff; that said Ann, in her life time, with her own funds, purchased and placed upon said real estate a dwelling house and improvements worth three hundred dollars.

The second paragraph of the complaint is substantially the same as the first, with the exception that it charges that the defendant, contrary to the understanding with said Ann, "falsely, fraudulently, and corruptly procured the deed to be made and executed to him."

The complaint concludes with a prayer for specific and general relief.

The defendant answered by the general denial. A trial was had in the Fountain Circuit Court, which resulted in a verdict for the plaintiff. The defendant paid the costs and took a new trial, under the statute. A change of venue was awarded to the Warren Circuit Court.

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The defendant asked the court for leave to withdraw his answer and demur to the complaint, which was refused, and the defendant excepted.

Upon an affidavit filed, that Hon. John M. Cowan, the judge of the court below, was a material witness, an order was made appointing Hon. John M. LaRue, judge of the 23d common pleas district, to try the cause.

Trial by jury; finding "for the plaintiff, and that she is the owner and entitled to the possession of three-fifths of the real estate described in the complaint." Motion for a new trial overruled. The evidence is in the record.

The first error complained of is the alleged insufficiency of the complaint. The objection taken to the first paragraph is, that it does not contain a prayer for relief. There is nothing in this objection. The complaint does demand the relief to which the plaintiff supposed herself entitled. This is all the code requires. 2 G. & H. 76, sec. 49, cl. 4.

It is claimed that the second paragraph is bad, because it does not show that the conveyance was taken to the husband without the consent of the wife. The statute provides that "when a conveyance, for a valuable consideration, is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter;" but it is further provided that this provision "shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name, without the consent of the person with whose money the consideration was paid." 1 G. & H. 651, secs. 6, 8. If the husband fraudulently took the conveyance in his own name, the consideration having been paid by the wife, a trust thereby resulted in favor of the latter. This is according to the rule in equity. The statute has not changed this rule. It is unfair to presume that the legislative intent was to promote fraud.

The complaint is sufficient, and the court committed no

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available error in refusing to allow the defendant to withdraw his answer for the purpose of demurring.

The next alleged error is, that the common pleas judge holding the circuit court, had no jurisdiction to try the case, as the title to real estate was in issue. The statute provides that when a change of venue is granted from the judge, "it shall be his duty to call some judge of the court of common pleas, circuit court, or of the supreme court, if such case be in the circuit court, to try said cause, who shall try or continue the same or change the venue thereof, as if it had originally been brought before him." 2 G. & H. 155, sec. 208. The judge, when called, holds the circuit court, and not the common pleas or the supreme court. Any other construction would deprive the court of all original jurisdiction when a judge of the supreme court is called. It is true that the common pleas court has no jurisdiction where the title to land is in issue, but the common pleas judge holding a special term of the circuit court has.

The defendant called on the plaintiff to prove a single fact, but she objected to testifying unless allowed to testify on her own behalf. The court ruled, that if the defendant was called by the plaintiff, she would be permitted to testify on her own behalf; thereupon the plaintiff was not required by the defendant to testify on the conditions prescribed by the court. There was no error in this. "A party examined by an adverse party may testify in his own behalf in respect to any matter pertinent to the issue." 2 G. & H. 189, sec. 300.

After the evidence and argument of counsel were closed, and while the court was instructing the jury, the defendant asked the court to require the jury to find specially in answer to interrogatories, if they found a general verdict: "1. Was all the consideration for the purchase of the property in controversy paid out of the money of the plaintiff's mother, Ann Malady, deceased? 2. What part of the purchase money of the property in controversy, if any,

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belonged to Ann Malady, deceased, the mother of the plaintiff?"

The court refused to require the jury to answer the interrogatories, and the defendant excepted, and assigned this action of the court as one of the reasons for a new trial.

In *Ollam v. Shaw*, 27 Ind. 388, this language is used: "Indeed, without a rule of court, the statute itself requires special instructions to be delivered to the court after the evidence closes, and before the argument commences. And in the absence of a statute, or of a rule of court, it would have been a reasonable requirement, of which the appellants would have had no right to complain. It is equally important that special interrogatories propounded to a jury should be subjected to the examination of the court, and that the opposite party should have an opportunity to submit objections, and this could not be done unless a reasonable time is allowed between their delivery to the court and the retirement of the jury."

In the case at bar, the court was asked, while charging the jury, to require the interrogatories to be answered. The court was called upon to stop in the midst of its charge, to consider the interrogatories offered. Such a proceeding is unheard of in practice.

The court was asked to instruct the jury, that "verbal testimony, to be sufficient to establish a resulting trust, in a case like this, ought to be clear and strong." This instruction was asked while the court was instructing the jury, and was not given as asked, but as follows: "A deed is a solemn instrument, and evidence to vary the effect expressed in it, and establish a resulting trust, must prove necessary facts by a clear preponderance." There was no error in this.

The court refused to allow the defendant to testify on his own behalf about matters which occurred prior to the death of Ann Malady, the ancestor of the plaintiff, and this is one of the reasons assigned for a new trial.

By the first section of the act of March 11th, 1867, a party to a civil action may testify in his own behalf. The second

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proviso of the second section of this act is as follows:— “That in all suits by or against heirs, founded on a contract with, or demand against, the ancestor, the object of which is to obtain title to, or possession of, land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause.” Acts 1867, 226.

This proviso differs from the third proviso of the third section of the act of March 6th, 1865 (Acts 1865, 59), in two particulars; it embraces suits by, as well as against heirs, and authorizes the court trying the cause to require either party to testify. *Sherfer v. Richardson's Adm'r*, 27 Ind. 122, is therefore not in point.

After a careful consideration of the question we have come to the conclusion that the appellant was not a competent witness on his own behalf as to matters occurring during the lifetime of Ann Malady.

The evident intent was, in suits by or against heirs, to exclude the testimony of the parties to the action as to any matter which occurred prior to the death of the ancestor, so as to prevent the living from testifying against the representative of the dead. Death having sealed the lips of one, the law seals the lips of the other. It may be that the language of the proviso is not broad enough to carry out this legislative intent, but we think it at least covers the present case. The language is not, “founded on a demand against the ancestor arising on contract,” but is, “founded on a contract with, or demand against, the ancestor.” If the plaintiff sues as heir, on a contract with the plaintiff’s ancestor, then the parties are excluded as witnesses by the letter of the proviso. If the suit is by the heir, as such, on a demand, not against, but in favor of, plaintiff’s ancestor, not arising on contract, then it depends upon the construction to be given to the other parts of the pro-

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viso as to whether the parties are competent witnesses for themselves or not.

- In the case at bar the appellee sues as heir of her ancestor, to enforce an implied trust growing out of the fact that the appellant took the title of the land in dispute in his own name when the purchase money was paid by the appellee's ancestor.

This court is not agreed as to the construction to be put on this proviso, and all that is ruled in this case is, that the appellant was not a competent witness for himself as to matter occurring before the death of the plaintiff's ancestor.

The judgment is affirmed, with costs.

J. McCabe, for appellant.

W. P. Rhodes, Monroe M. Milford, and A. A. Rice, for appellee.

BEARD v. SLOAN

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164 664

CONTRACT.—*Sale of Goods.—Pleading.*—In a suit on a contract for the sale of goods to be delivered at a certain time and place, the complaint should show an obligation on the plaintiff to receive and pay for the goods, and aver that he was ready to pay the price according to his promise, upon the delivery of the goods as contracted.

APPEAL from the Johnson Common Pleas.

GREGORY, J.—Suit by Sloan against Beard on a contract for the sale and delivery of corn. The complaint is in two paragraphs. The first avers that on, &c., the defendant entered into a parol agreement with the plaintiff, wherein he agreed to deliver to him at the station Needham, on the Cincinnati and Martinsville railroad, on the cars of the company, fifteen hundred bushels of good merchantable corn, in the ear; that in consideration thereof, the plaintiff agreed to pay the defendant, on delivery, eighty cents per

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bushel therefor; that at the time of making the contract, the plaintiff paid the defendant five dollars thereon; that the corn was to be delivered between the 7th and 12th days of September, 1867; that the plaintiff, relying upon the agreement, sold the corn to one William Joice for ninety cents per bushel; that the corn was worth ninety cents per bushel at the time and place of delivery; that the defendant failed and refused to deliver the corn at the station Needham within the time agreed on, to the plaintiff's damage in the sum of five hundred dollars.

It is averred in the second paragraph, that on, &c., the defendant agreed to and with the plaintiff, to sell and deliver to him at the station of Needham, on the Cincinnati and Martinsville railroad, in Johnson county, Indiana, one thousand bushels of good merchantable corn, in the ear, at eighty cents per bushel; that at the time of making the contract, the plaintiff paid the defendant thereon the sum of five dollars, in part payment of the purchase money of the corn; that the defendant agreed to deliver the corn between the 7th and 12th days of September, 1867; that the plaintiff was present at the time and place agreed upon, ready to receive the corn, but that the defendant wholly neglected and refused to deliver it; that the corn was worth ninety cents per bushel at the time and place of delivery.

A demurrer to each of these paragraphs was overruled.

Both paragraphs are fatally defective in not averring that the plaintiff was ready, upon the delivery of the corn, to pay the defendant the price, according to his promise. *Smith v. Smith*, 8 Blackf. 208.

The second paragraph is also defective in omitting the averment that the plaintiff promised to pay the defendant for the corn on delivery. This paragraph does not show that there was any obligation on the plaintiff to receive and pay for the corn.

There were questions made on the answer, and in the progress of the cause, after the overruling of the de-

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murrers to the complaint, but, as there was a trial on a bad complaint, these become immaterial.

The judgment is reversed, with costs, and the cause remanded, with directions to sustain the demurrers to the complaint, and for further proceedings.

S. P. Oyler and D. W. Howe, for appellant.

D. D. Banta and C. Byfield, for appellee.

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HARTMAN v. LEE and Others.

Heirs.—*Covenant of Ancestor.*—A tenant by courtesy sold, and by warranty deed conveyed, the land in which he had such estate.

Held, that after his death the heirs at law, to whom such real estate descended in fee from the wife, were entitled to the possession thereof, though they were children and heirs at law of the husband and had received from him, by descent, an estate of much greater value than the land so conveyed.

Same.—*Decedents' Estates.*—After the death of the grantor in a deed of conveyance of real estate, a claim for damages upon the breach of a covenant of warranty therein must be filed against his estate as provided in section 62, 2 G. & H. 501; and if not so filed is liable to become barred.

Same.—*Liability of.*—The only statutory provisions making the heirs and devisees liable in such cases after settlement of the decedent's estate, seem to be those commencing with section 178, 2 G. & H. 534.

APPEAL from the Montgomery Circuit Court.

ELLIOTT, J.—Petition for partition by the appellees against Hartman, the appellant.

The petitioners are the heirs at law of Dorcas Lee, deceased; four of them being her children and the remaining one a grand child, who represents his deceased mother.

They claim one undivided seventh of the land described in the petition, containing in all about one hundred and forty-three acres situate in Montgomery county, by descent from Dorcas Lee, who died prior to 1852, and who was one of the children and heirs at law of Henry and Nancy Nich-

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olson, deceased, and allege that Hartman, the appellant, is the owner in fee of the other six-sevenths of said land.

Hartman filed an answer claiming to be the owner in fee of the whole of the land described in the petition, and the following state of facts: Henry Nicholson died, seized in fee of the land, leaving seven children as his heirs at law, to whom it descended. Dorcas, under whom the plaintiffs claim, was one of said children, and was married to Joel Lee, who was the father of four of the petitioners and the grandfather of the other. Joel Lee and the defendant Hartman purchased of the other heirs of Henry Nicholson, deceased, the other six-sevenths of the land, and took the conveyances therefor in their joint names; but it is averred in the answer, that, regarding Joel Lee as the owner of the other seventh through his wife, Hartman paid the whole of the consideration for one of the sevenths so conveyed to them jointly, so as to make himself and said Joel equal in the whole tract; and that as such they held and enjoyed the same until the 5th day of May, 1866, at which time said Joel Lee sold and conveyed to Hartman, by a warranty deed, one undivided half of the whole tract. Joel Lee died in July, 1867, and it is averred in the answer that each of the petitioners inherited from him, as his heirs at law, real and personal property of the value of ten thousand dollars. Wherefore, it is claimed that the petitioners "are rebutted and estopped from claiming, or asserting any title or interest in said land," &c.

The court sustained a demurrer to the answer, because the facts alleged did not constitute a defense to the petition. Partition was subsequently made according to the prayer of the petition.

The ruling of the court, in sustaining the demurrer to the answer, presents the only question in the case. It is contended by the appellant that, as the petitioners received an estate from their father, Joel Lee, by descent, of a much greater value than the interest claimed by them in the land, they are bound by the covenant of warranty in his deed to

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the appellant, and are therefore rebutted and estopped from claiming title to the land in opposition to said deed. The argument in support of the position is based on the ancient doctrine of the common law, of lineal and collateral warranties, of which rebutter was an incident. 2 Wash. on Real Prop. 718, 719 (2d ed.).

We need not determine the question whether the doctrine of lineal and collateral warranties, with its incident of rebutter, is applicable to the facts presented by the appellant's answer, as that doctrine is expressly abolished by statute in this State. Section 10 of "an act concerning real property and the alienation thereof" (1 G. & H. 259) is as follows: "Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement shall be answerable upon such covenant or agreement to the extent of property descended or devised to them, and in the manner prescribed by law."

As the whole of a decedent's property both real and personal, as against his heirs, is subject, by the laws of this State, to the payment of his debts and liabilities, the claim for damages, upon the breach of such a covenant, should be prosecuted against his personal representative, or filed against his estate, as provided in section 62 of the act in relation of the settlement of decedents' estates (2 G. & H. 501), and if not so filed is liable to become barred. The only statutory provisions making the heirs and devisees liable in such cases, after the settlement of the estate of the decedent, seem to be those in the last cited act commencing with section 178.

Under the facts presented by the record before us, Dorcas Lee was seized in fee of the one undivided seventh of the land claimed by the petitioners, which at her death descended to them as her heirs at law, subject to the life estate of Joel Lee her husband, by courtesy, and at his death the petitioners were entitled to possession.

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The answer presented no defense to the petition, and the demurrer was therefore properly sustained.

The judgment is affirmed, with costs.

S. C. & L. B. Willson, for appellant.

J. McCabe, and J. M. Butler, for appellees.

LOVE v. CARPENTER and Others.

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156 379

PARTNERSHIP.—*Private Use of Partnership Property by one Partner.*—If one partner clandestinely uses the partnership funds or property in his own private speculation, he must account, not only for the funds or property so employed, but also for the net profits realized by the transaction.

PRACTICE.—*Appeal.*—*Reserved Question of Law.*—If it is expected to reverse a judgment upon a question of law reserved for the decision of the Supreme Court, under section 347 of the code, such question must generally be so presented below that the lower court, by doing what the complaining party moves it to do, can cure or avoid the error complained of.

APPEAL from the Floyd Circuit Court.

FRAZER, J.—This was a suit between partners (railroad contractors), for the adjustment of the business of the firm. It was tried by a referee, who found that Carpenter had, out of his private means, made advances for the firm, in paying off its paper made for loans of money and expenses and discounts, the sum of \$35,850.16; that there was also due him, for personal services and expenses, \$22,596.83; that he had paid to sub-contractors \$150,582.66; and that assets of the firm had come into his hands in the sum of \$214,797.31. The conclusion of the referee from these facts was, amongst other things, that in stating the account between Carpenter and the firm, he should be credited with \$150,582.66, and also the \$35,850.16, &c. This conclusion was excepted to, and it is contended here that there was error in it, in this: that the larger sum embraced the

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smaller, and that the latter should not, therefore, have been allowed. But the premises of this argument are not true, according to the facts found, and the argument consequently fails.

Again, the referee found that Carpenter became a member of a mercantile firm (J. C. Jewell & Co.), and used for its benefit bonds of the firm of railroad contractors (Carpenter & Co.), nominally \$74,270.90, but only of the cash value of \$34,740, besides using, also, without authority, the name and credit of the firm of Carpenter & Co. in purchasing goods for the mercantile firm; so that all the purchases of goods for the latter firm were made with either the means or credit of the former; and that the mercantile business made a profit, counting the bonds at their nominal value, \$74,270.90; and therefrom concluded that Carpenter should be charged, in this suit, with \$34,740, only, for the bonds so used, that sum being their value in cash. To this conclusion the appellant excepted, and insists here that Carpenter should have been held to account, not only for the actual value of the partnership property so used without the consent or knowledge of his co-partners, but also the profits realized by him out of the transaction.

It seems to be well settled by the cases, and to rest upon unquestionable principles of public policy, that if one partner clandestinely uses the partnership funds or property in his own private speculations, he must account, not only for the funds or property so employed, but also for the profits realized by the transaction. *Stoughton v. Lynch*, 1 Johns. Ch. 467; *Crawshay v. Collins*, 15 Ves. 218; Collyer on Part. B. 2, ch. 2, §§ 182, 186.

But the referee does not find the net profits, or sufficient facts to determine them by calculation. It is found generally that Carpenter realized a profit by the use of the assets of the firm of Carpenter & Co., in the mercantile adventure of J. C. Jewell & Co.; that a dividend of such profits, of \$8,000, was at one time declared, of which Carpenter received one-fourth; and that the gross profits of J. C. Jew-

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ell & Co. were \$24,900, i. e., that sales of goods exceeded purchases by that sum. But the expenses of conducting the business are not found. He finds that Carpenter is chargeable with a certain sum, and judgment was rendered accordingly. But the sum so found was too small, in consequence of the failure to charge Carpenter with profits derived by him from the use of the partnership assets in the mercantile business.

The appellant excepted to so much of the report of the referee as we have already said was erroneous, and moved for judgment upon the report, on the theory of charging Carpenter also with the profits made by him in the mercantile business. The exception and motion were overruled, and the question reserved under section 347 of the code. There was no motion by the appellant for a new trial, nor to set aside the report, though the latter motion was made by the appellee, and overruled. The referee was not required to, and did not, state the facts found and the conclusions of law separately. It seems to us that the court below rendered the only judgment which could have been rendered upon the report, and that the only remedy available to the appellant for the fault complained of, was to have moved to set aside the report. There were not facts enough found to form the basis of such a judgment as the appellant asked the court to render upon the report.

Though a question of law may be reserved for the decision of this court under section 347 of the code, yet, if it is expected to reverse the judgment upon it, it must generally be so presented below that that court could cure or avoid the error complained of by doing what the party moves it to do. This was not done in the present case. The report of the referee was very lengthy, and it seems to have escaped the notice of counsel below, as well as in this court, that it fails to find the net profits which Carpenter realized by investing the assets of the firm in the mercantile business. It must be apparent that the excess of sales of goods over their cost would form no proper basis for a judgment;

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for these must be diminished by deducting the expenses of the enterprise, and may be still further reduced, and possibly entirely absorbed, by losses upon debts due for sales on credit, of which it appears by the report that a large sum is not collected.

The judgment is affirmed, with costs.

H. Crawford, for appellant.

THE STATE v. POTTMAYER.

CRIMINAL LAW.—Indictment.—Trespass.—An indictment charging the defendant with cutting, sawing, and removing from the land of another, without license, a certain quantity of ice of the value of ten dollars, the property of the owner of the land, it not appearing therefrom whether the ice was taken from a running stream or from a natural or artificial pond, was held good.

Query as to what evidence would justify a conviction.

APPEAL from the Cass Circuit Court.

This was an indictment in which the offense was charged in these words: "That on or about the 20th day of December, A. D. 1867, at the county of Cass and State of Indiana, one John Pottmeyer did then and there unlawfully cut, saw, and remove from land belonging to one Daniel P. Baldwin, in said county, one hundred cubic feet of ice, of the value of ten dollars, being then and there the property of the said Daniel P. Baldwin, without a license so to do from said Daniel P. Baldwin, or any other competent authority, contrary," &c.

FRAZER, J.—The indictment was quashed below, and this is the error assigned.

The only question involved is, whether under our statutes it is a crime to cut and take from the land of another

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valuable ice, frozen thereon, the property of B., the owner of the land. It does not appear by the indictment whether the ice was taken from a running stream or from a natural or artificial pond. If it is possible for the land owner, in any case, to have property in ice formed upon his land, the indictment should have been sustained. The averment in this case was, that the ice was of the value of ten dollars, the property of the owner of the land; and this would warrant any proof by which its truth could be shown. If the proprietor of land should construct a pond upon his estate, and supply it with water from his own well, we suppose his property in the ice which in winter might be formed upon the pond could not be questioned. More than this need not be said in passing upon the question now before us.

If, upon the trial, it shall appear by the evidence that the ice was cut upon a stream flowing over the land of B., then there will arise an inquiry not quite so easy of solution. This is the question now chiefly argued by the appellant, while the appellee is altogether silent here. Since ice has become an article of extensive commerce, its consumption annually increasing, and thus establishing it amongst the wants, or, at any rate, the comforts of every-day life, it will be a question of much practical importance, and one upon which this court should not desire to enter prematurely, or without the aid of thorough and exhaustive argument. It will be a question, too, which, so far as we are aware, must be decided in the absence of direct authority anywhere, and, therefore, to be solved by the application of general elementary principles and analogies. For these reasons, and the further one that its determination now would be extrajudicial, not arising upon the record before us, we do not mean, at present, to intimate any opinion upon it.

The judgment is reversed, with costs; motion to quash to be overruled.

*D. E. Williamson, Attorney General, D. P. Baldwin, and
D. H. Chase, for the State.*

Ratcliff v. Leunig and Others.

RATCLIFF v. LEUNIG and Others.

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165	693

DECEDENTS' ESTATES.—*Claims.*—All claims against decedents' estates not excepted by section 62, 2 G. & H. 501, if not filed as required by that section, are barred, except as provided by section 178 of the same act.

SAME.—The maker of a promissory note and the surety thereon both died, the former intestate, the latter testate. The holder of the note filed it as a claim against the estate of the maker only, on final settlement of which he received part payment, this estate being insolvent. After both estates had been finally settled, the creditor brought suit against the devisees of the surety for the balance due on the note. The complaint did not bring the case within section 178, 2 G. & H. 534.

Held, that the suit was barred.

Held, also, that the facts that the claim was filed against the estate of the principal, and that it could not be known what portion of the note would be paid by that estate until final settlement thereof, did not prevent the creditor from filing the claim against the estate of the surety also, at any time after the grant of letters testamentary, or excuse him from so filing it.

APPEAL from the Posey Circuit Court.

ELLIOTT, J.—On the 12th of July, 1864, Francis Schenk borrowed of Ratcliff, the appellant, two hundred dollars, for which he gave the latter a promissory note, with Henry Leunig as surety, payable one year thereafter. Schenk died in February, 1865, intestate, and Leunig died in March of the same year, testate; and before the note became due, administration was duly granted on the estate of Schenk, and letters testamentary on the estate of Leunig, by the Posey Common Pleas. The appellant filed the note as a claim against the estate of Schenk, which was duly allowed by the administrator, but he did not file it against the estate of Leunig. Both estates were finally settled at the July term of the court, 1867. Schenk's estate was insolvent, and the appellant received on the claim \$66.69, being the distributive share payable on said note, on the final settlement of the estate, leaving the residue of the note unpaid. In September, 1867, after both estates were finally settled, the appellant commenced this suit against the devisees of

Ratcliff *v.* Leunig and Others.

Leunig, to recover the balance due on said note. The court sustained a demurrer to the complaint, which presents the only question in the case. We think the ruling of the court was correct. Section 62 of the act relating to the settlement of decedents' estates (2 G. & H. 501) provides that "a succinct statement of the nature and amount of every claim, whether due or not, against the estate of any decedent, except judgments which are liens upon the decedent's real estate, and mortgages of his real or personal estate, obtained and executed in his lifetime, and expenses of administration, must be filed in the office of the clerk of the proper court of Common Pleas, within one year from the date of the first appointment of an executor or administrator therein, and notice thereof; or no costs shall be recovered therein against such executor or administrator; * * * and after the expiration of one year from such appointment and notice, if such claim be not filed at least thirty days before final settlement of the estate, it shall be barred, except as hereinafter provided in case of the liabilities of heirs and devisees."

The exceptions referred to in this section are contained in section 178 of the same act (2 G. & H. 534), which reads as follows: "The heirs, devisees, and distributees of a decedent, shall be liable to the extent of the property received by them from such decedent's estate to any creditor whose claim remains unpaid, who, six months prior to such final settlement was insane, an infant, or out of the State; but such suit must be brought within one year after the disability is removed." This is the only statutory provision, that we are aware of, making the heirs, devisees and distributees of a decedent, liable, on account of the estate received by them, for the debts of the decedent. In the case under consideration the complaint shows that the claim was not filed against the estate of the decedent Leunig, and that the estate was finally settled before the commencement of this suit, and there is nothing in the complaint to bring the case within section 178 copied above. But it is urged

The Louisville, New Albany, and Chicago Railroad Company *v.* McAfee.

in argument that the claim was properly filed against the estate of Schenk, as he was the principal in the note, and that it could not be known what portion of it would be paid by that estate until the final settlement thereof. These facts, however, did not prevent the appellant from filing the claim against the estate of Leunig at any time after the grant of letters testamentary, nor do they excuse the appellant from doing so.

The judgment is affirmed, with costs.

J. & H. C. Pitcher, for appellant.

E. M. Spencer and *W. Loudon*, for appellees.

THE LOUISVILLE, NEW ALBANY, AND CHICAGO RAILROAD COMPANY *v.* McAfee.

DAMAGES.—*Railroad.*—If a railroad company in constructing its road make a ditch along the side thereof so as to carry off the water from the adjoining land to a natural channel, it is not bound to keep such ditch open, if the flow of the water is not changed injuriously to the owner of the land by the building of the road.

APPEAL from the Tippecanoe Civil Circuit Court.

RAY, C. J.—Complaint by appellee charging that he is damaged by the appellant, in this: that when said company constructed its road, it made a ditch along the east side of said road, where the same runs through the lands of the appellee, so as to carry the water from the south line of said land where the road crosses, to a point where the road crosses the west line of said tract, where there was a natural channel, about the centre between said crossings; that when first made, said ditch carried off the water, but appellant has since suffered the same to become obstructed and has thrown ties and telegraph poles in said ditch, whereby

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said land is overflowed. A demurrer was overruled to this complaint.

It will be observed that the complaint does not charge that the flow of water has been changed injuriously to the plaintiff by the building of the road, but that inasmuch as the defendant has for days or years carried off the water from his land, it is in fault for not continuing so to do. The demurrer should have been sustained. We do not regard it as proper to discuss any question made on the trial, as no sufficient complaint was on file.

The judgment is reversed, with costs.

H. W. Chase, and J. A. Wilstach, for appellant.

J. L. Miller, M. Jones, and S. T. Stallard, for appellee.

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126	538
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CATE v. CRANOR, Executor, and Others.

STATUTES.—Construction of.—Words and Phrases.—The definitions of words and phrases in section 797 of the code are applied only in the construction of statutes, and not of wills or private instruments.

WILL.—Construction of.—A clause of a will was as follows: "My further will and desire is that my executors sell all of my property not above named, and the proceeds, after paying all my just debts and the above named bequests, be divided amongst my sons A., B., C., D., and E., and my daughters F., G., H., and I."

Held, that where the instrument, considered as a whole, indicated that it was the intention of the testator to dispose of his entire estate, or left his intention in this regard in doubt, this clause would dispose of money and the avails of promissory notes and other claims held by the testator at his death, and real estate acquired by him after the execution of the will and owned by him at his decease.

SAME.—Any construction which will result in partial intestacy is to be avoided, unless the language of the will compels it.

APPEAL from the Wayne Common Pleas.

Cate v. Cranor, Executor, and Others.

This was a suit by Cate, the appellant, against the executor and heirs at law of Joshua Cranor, deceased.

The complaint was in two paragraphs. It was averred in the first that the appellant was entitled to an equal tenth of a large amount of money and notes belonging to the estate of said decedent, and undisposed of by his will, and which had descended under the law to the appellant and the appellees in equal proportions; that said notes had been reduced to money, and the amount was in the hands of the executor, ready for distribution, and that the executor had refused to account to the appellant, &c.

The second paragraph alleged that the decedent made his last will and testament, a copy of which was made part of this paragraph, which, after his death, was duly proved and entered of record; that at the time of making said will the testator was possessed of money to the amount of eleven thousand dollars, which afterwards he invested in certain real estate described, of which he died seized; that thereby the testator designed to revoke, and did revoke, said will as to said sum of eleven thousand dollars, and that said real estate, under the circumstances, did not pass under said will to the legatees there named, but descended to the decedent's heirs at law, as one of whom appellant claimed participation.

The appellees filed the same answer to both of these paragraphs, setting up the will made by the decedent, and claiming that according to its terms the appellant took no part of the money, notes, or real estate.

A demurrer to this answer was overruled, and this is assigned as error.

FRAZER, J.—This case calls for an interpretation of a clause of the testator's will, which is as follows:

"My further will and desire is, that my executors sell all of my property not above named, and the proceeds, after paying all my just debts and the above named bequests, be divided amongst my sons Thomas, Stephen, William, Moses,

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and Milo, and my daughters Sarah, Anna, Hannah, and Annanda."

The appellant was a grandson of the testator, and claims that the foregoing clause does not dispose of money and the avails of promissory notes and other claims held by the testator at the time of his death, and that in such assets he is entitled to share. We do not find ourselves able to concur in that view of the subject. The phrase "all my property" is exceedingly comprehensive. We do not place any reliance upon the definitions cited from the statute (2 G. & H. 336, sec. 797), for these are applied only in the construction of statutes, and not of wills or private instruments. But the term "property" had quite as broad a signification long before our legislature turned its attention to lexicography; and embraced as well the right which one has to things in action as to those in possession, including things both real and personal, promissory notes and money. This is not controverted by the appellant, but it is contended that the direction of the will to "sell all my property" shows that the testator used the word "property" in a more limited sense, inasmuch as it is not usual or prudent to sell money or promissory notes, and it is not to be supposed that he meant to require so foolish and unusual a thing; that it is only the proceeds of property directed to be sold which is disposed of by the clause, and consequently as to money and notes the case is as if no will had been made.

It must be conceded that there is at least much plausibility in the appellant's argument. But we think it is unsound. The only legitimate office of construction in the case is to ascertain the testator's intention. Did he mean to dispose of the whole estate? That he did seems to us to be strongly indicated by the part of the will above set out; for it must be remembered that promissory notes and other evidences of debt, and even money, are capable of sale and transfer. Gold and silver coin are now articles of very extensive traffic, and notes and bonds, if they had long to run

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before maturity, might, with great propriety, be directed to be sold to avoid delay in the settlement of an estate. It will be seen, therefore, that the argument based upon the improbability of an intention to sell such property does not rest upon a sure foundation. Nor is it supported by authority. *Hearne v. Wigginton*, 6 Mad. 119, is the other way, and much in point. There the language of the will was: "All my other effects I will to James Hearne, to be sold for his benefit." Money constituted part of the estate not otherwise disposed of. The VICE-CHANCELLOR said, "It is uncertain, at the making of the will, what the testator's property may consist of at his death, and the direction to sell implies only a general intention on the part of the testator that his residuary property shall be converted or collected for the benefit of his residuary legatee." But there are other parts of the will which greatly strengthen the conclusion that the testator intended to dispose of his whole estate. The appellant and the appellees were the heirs at law, entitled to take in equal shares any portion of the estate not disposed of. Certain sums of money or specific property are given to several of the appellees absolutely. To the appellant is given the sum of one hundred dollars when he arrives at twenty-one years of age, with a proviso that if he shall die before reaching that age, then this sum mentioned shall be divided amongst the other heirs. Then follows the clause in question. Now, it is almost past belief that the testator, having provided that the small bequest of one hundred dollars to the appellant should lapse in case the latter died during minority, should yet leave a large estate (several thousand dollars) to go to the appellant absolutely by partial intestacy. It is difficult to imagine any intelligent purpose which would have prompted the annexing of such a condition to the bequest under such circumstances.

Any construction of a will which will result in partial intestacy is to be avoided, unless the language of the will compels it; for the very fact of making a will is strong evidence of the testator's purpose to dispose of his whole es-

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tate. 2 Redf. Wills, 442. If this is a doubtful case, therefore, the decision would be against the appellant. But we are not prepared to say that the language of the will gives rise to serious doubt, when the whole instrument is considered.

It seems to us that what has been said applies as well to real estate acquired by the testator after the execution of the will, as to money and promissory notes. We perceive nothing in the statute of wills which requires the application of any different rule.

The judgment is affirmed, with costs.

J. B. & J. F. Julian, for appellants.

W. A. Peele, and *J. P. Siddall*, for appellees.

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BOURGETTE and Another v. HUBINGER and Others.

COMMON PLEAS COURT.—*Jurisdiction.*—*Title to Real Estate.*—The common pleas court is not deprived of jurisdiction by reason of the title to real estate being put in issue in a cause commenced in that court, when it does not appear on the face of the complaint that such question is involved, and no subsequent pleading raising that issue is verified by affidavit.

SAME.—*Mechanic's Lien.*—Where the question of title to real estate is incidentally put in issue in the common pleas in a case in which jurisdiction is expressly conferred on that court, as in a suit to enforce a mechanic's lien, the jurisdiction is not thereby ousted.

MECHANIC'S LIEN.—*Insufficient Notice.*—*Practice.*—In an action to enforce a mechanic's lien under the statute, the objection that the notice of the lien filed in the recorder's office does not contain a sufficient description of the property against which the lien is sought, is not raised by demurrer to the complaint, but by motion to strike out that part of the complaint relating to the lien.

SAME.—*Pleading.*—*Complaint.*—The question of the indebtedness and of the right to the lien are properly presented in the same paragraph of the complaint.

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DEPOSITIONS.—*Parties.*—Where a party to a suit is a competent witness, his deposition may be taken under the rules governing the taking of the depositions of other witnesses.

APPEAL from the Bartholomew Common Pleas.

ELLIOTT, J.—Three several suits were instituted, one in favor of Hubinger, Dorsey & Co., against Bourgette and Snyder, on an account and promissory note. The complaint alleges that the defendants built and constructed a distillery on property known as “the distillery property” (which is then described by metes and bounds), in Bartholomew county, and at their instance and request the plaintiffs furnished and put up in said distillery the machinery, works, and materials therefor, a bill of particulars of which is filed with the complaint, amounting to \$298.32, for a part of which, to wit, \$284.85, the defendants, on the 28th of March, 1867, executed to the plaintiffs their promissory note, due at thirty days; that on the 8th day of April, 1867, and within sixty days from the time they completed said works, machinery, and materials, the plaintiffs filed in the recorder’s office of said county a mechanic’s lien on said machinery, materials, distillery, and land, which was duly recorded; that said indebtedness is due and unpaid. A copy of the notice of the lien is also made part of the complaint. Prayer for judgment for \$350; that it be adjudged a lien on said property; and for a sale thereof, &c. The notice of the lien is as follows: “To all whom it may concern.—Take notice, that the undersigned intend to hold a lien on the following described property, being part of the northwest quarter of section 3 town 8, range 7 east, situate in or near the town of Burnsville, in Bartholomew county, Indiana, and all buildings, improvements, machinery, and appurtenances of every kind theron, it being the distillery property constructed by Jacob Bourgette; said lien hereby made and created being for materials furnished, work and labor rendered, in and upon said distillery, at the request of Jacob Bourgette, and the same amounts to \$298.80, for

Bourgette and Another v. Hubinger and Others.

which said Bourgette has executed his note. This 8th day of April, 1867. Hubinger, Dorsey & Co."

It was filed and recorded in the recorder's office on the same day it bears date.

The defendants demurred separately to the complaint. The demurrs were overruled, and Snyder then answered in three paragraphs.

1. The general denial.

2. That he never was a partner, or in any way connected with his co-defendant, Jacob B. Bourgette, in the erection or construction of the distillery described in plaintiffs' complaint; that he never in any wise contracted or agreed in any way or manner with the plaintiffs for the payment of any demands made or entered into by his co-defendant; that he never executed in any wise the note sued on as described in the plaintiffs' complaint, nor authorized either Bourgette, the said co-defendant, or any one else, to sign his name either to a note or any other contract or agreement; that he never ratified, in any way, the said signature, and that he does not owe, either singly or in connection with his co-defendant, or any one else, the amount of one cent to the plaintiffs; and that he never authorized any person, at any time, to execute a note or any instrument to these plaintiffs. This paragraph was verified by the affidavit of Snyder.

3. That he is the owner, in fee simple, of the property and lands described in plaintiffs' complaint; says he never executed the note sued on in plaintiffs' complaint; that he never ordered any of the purchases, and had no knowledge of the same, and never ratified the same, and had no knowledge of the work and labor set forth in plaintiffs' complaint being performed; that said lands were deeded to him long before the filing of said mechanic's lien in the recorder's office of the county, and before the property was purchased from plaintiffs; and he further says that when he purchased said property he had no knowledge of any lien

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of plaintiffs on said land; that he is the *bona fide* owner of the same, and that Bourgette, his co-defendant, has no title or interest in the said land; that the land was conveyed to him by warranty deed, for a valuable consideration, on the 29th day of August, 1866; and that he never purchased any materials from plaintiffs, and had no knowledge of the same being purchased, and never authorized any one to purchase said materials for him in any manner whatever; wherefore he asks that said lien be declared void, &c.

' Bourgette answered in two paragraphs.

1. The general denial.
2. Admitting that the plaintiffs furnished the machinery, &c., as alleged, and that he executed the note sued on, but alleges that at the time the machinery was furnished and delivered to him, and a long time prior thereto, he was not the owner of the property sought to be reached, and had no interest whatever in said property; that he conveyed and sold said property to one Adam Snyder, for a valuable consideration, on the 29th day of August, 1866; that he has now no title or interest whatever in said property, and had none at the date of the purchase of said materials; and that Snyder never ordered the purchase of said property, and had no knowledge of the same; wherefore he prays judgment.

The plaintiffs filed separate replies to the separate answers of Bourgette and Snyder; but, as they are substantially the same to each, it will only be necessary to refer specially to that to the answer of Snyder, which consists of four paragraphs.

The first is the general denial.

2. That said pretended deed of conveyance was executed by said Bourgette to said Snyder as and for a security to said Snyder; that Snyder was furnishing the means wherewith said distillery was to be constructed, and lent his name in procuring the material and labor for the construction of the same, and was interested therein as partner; and, to indemnify and secure the said Snyder therein, the said Bour-

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gette executed said deed to him; that the same was intended as a security only and a mortgage as aforesaid, and the same is subject to said claim of plaintiffs.

3. That the said distillery was being constructed as aforesaid, and material and labor furnished therefor, and said Snyder, knowing said facts, stood by and suffered and permitted said plaintiffs to render said labor and furnish said material, without objection and without notifying these plaintiffs of any interest he held in said property; he superintended the construction of the same in all its parts, and started and run the said machinery after the same was constructed, and has used and occupied said distillery continually since its completion; that he knew of the construction of said distillery, and in no way claimed the ownership of said property; wherefore, &c.

4. The plaintiffs for further reply say that said deed was made to said Snyder by said Bourgette for the fraudulent purpose of cheating and delaying said Bourgette's creditors; that he was largely indebted and contemplated indebtedness, and to cheat and defraud said creditors, and especially these plaintiffs, said deed of conveyance was made and executed; that it was done through the collusion and fraud of said Snyder and Bourgette, to defraud said Bourgette's creditors, and said Snyder paid no consideration therefor; wherefore, &c.

Another of said actions was instituted by Kerr, Payne & Co. against Bourgette alone, on an account for \$93.24, for materials in the erection of a distillery, and forming a part of the machinery thereof, furnished by the plaintiffs to Bourgette. It is alleged in the complaint that, by the terms of the contract, said sum became due on the 24th day of February, 1867; "that the materials were used in erecting a distillery on the following described premises, to wit: part of the northwest quarter of section 3, town 8, range 7 east, situate in the town of Burnsville," in Bartholomew county, Indiana; that said premises were, at the time of making said contract, "and until the filing of notice

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of lien hereinafter mentioned, the property of said defendant; that on the 25th day of January, 1867, and after the performance of said contract, within sixty days after the completion of said distillery, the plaintiffs filed with the recorder of said county, notice of the lien claimed upon said premises for said indebtedness;" specifying the amount of the claim, and the name of the defendant as the person indebted and the owner of the property; that the claim remains unpaid; and demands judgment, for the sale of the premises, &c.

The notice of the claim and lien, filed in the recorder's office is as follows: "Mr. J. B. Bourgette, take notice that I intend to hold a lien on the following described property furnished to you and used by you in repairing and building the distillery located on the following described property, to wit: part of the north-west quarter of section 3, town 8, range 7 east, situate in the town of Burnsville, Indiana, county of Bartholomew, for the sum of ninety-three and 24-100 dollars." It was filed in the recorder's office, January 25th, 1867. Attached is a bill of particulars of the account, the last item of which is dated November 25th, 1866.

Bourgette demurred to the complaint. The demurrer was overruled, and he then answered in two paragraphs. The first is a general denial. The second admits that he purchased the materials of the plaintiffs as alleged in the complaint, but says that prior thereto, on the 29th day of August, 1866, for a valuable consideration he sold and conveyed the property, on which a lien is sought, to Snyder, and has no title or interest therein, and prays that Snyder be made a party.

The third case referred to is a suit brought by Sitze against Bourgette, for \$19.91, for materials furnished in the erection of the distillery on the property described in the complaint as the north-west quarter of section 3, town 8, range 7 east, situate in the county of Bartholomew, and State of Indiana, in the town of Burnsville, belonging to the de-

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fendant, on which a lien is claimed. It is alleged that notice of a lien was filed in the recorder's office, and recorded on the 25th day of January, 1867, and within sixty days after the completion of said distillery. The notice reads as follows: "Mr. J. B. Bourgette, take notice that I intend to hold a claim on the following described property furnished to you and used by you in repairing and building the distillery located on the following described property, to wit: part of the north-west quarter of section 3, town 8, range 7 east, situate in the town of Burnsville, county of Bartholomew, State of Indiana, for the sum of \$19.91. November 25th. To piping, \$19.91. John Sitze."

A demurrer was filed to the complaint by Bourgette, which was overruled. He then filed an answer, which is in substance the same as that filed to the complaint of Kerr, Payne & Co.

Snyder on his own application was admitted as a defendant to the two actions last named, and filed an answer in each, in which it is alleged that he is the owner in fee simple of the real estate sought to be reached by the plaintiffs' lien; that Jacob B. Bourgette, his co-defendant, for a valuable consideration, sold and conveyed to said Snyder, on the 29th day of August, 1866, and the deed was duly recorded in the recorder's office of the county, before the time said materials were furnished or contracted for; and long before said lien was filed in the recorder's office he was the owner as above set forth; that said Snyder had no knowledge of the purchase of said materials set forth in plaintiffs' complaint, and never consented to the purchase of any material for said buildings; and that his co-defendant had no title or interest in any of the said lands and buildings whatever; wherefore, &c.

Replies were then filed to the answers of both defendants in each of the last named actions, putting them at issue. One of the paragraphs in reply to the answer of Snyder in each case alleged that the conveyance of the property by Bourgette to Snyder referred to in his answers was made

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witout any consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Bourgette, and was therefore null and void.

The several cases, by order of the court, were then consolidated for trial, and were submitted to the court, a jury being waived. The court found for the defendant Snyder, on his answer denying the execution of the note in favor of Hubinger, Dorsey & Co.; that the several claims were due from Bourgette to the several plaintiffs, as alleged in their complaints; that said several sums were liens on the real estate in controversy; and that the conveyance thereof from Bourgette to Snyder was fraudulent and void as to the plaintiffs.

Motion for a new trial in each of the original cases was made by Snyder and overruled, and judgments in accordance with the finding. Separate errors are assigned, but most of them present the same question in each case.

1. The first point raised by the appellants for a reversal of the judgment is, that the answer of Snyder and the issues made thereon put in issue the title to real estate, which deprived the court of common pleas of further jurisdiction of the cause, and the case should have been certified to the circuit court.

Section 11 of the common pleas act (2 G. & H. 22) provides that, "in all civil cases, except for slander, libel, breach of marriage contract, and when the title to real estate shall be put in issue as hereinafter provided, the court of common pleas shall have concurrent jurisdiction with the circuit court," &c., and then provides that "when it appears upon the face of the complaint or by other legitimate pleadings verified by affidavit, that the title to real estate is in issue in the common pleas court of any county," the cause shall be transferred to the circuit court. Here it did not appear on the face of the complaint that the title to real estate was in issue; nor were any of the subsequent pleadings raising such an issue verified by affidavit and hence the case was not brought within the exception stated

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in the statute. Besides, the 651st section of the code (2 G. & H. 300) expressly gives the court of common pleas concurrent jurisdiction with the circuit court in cases to enforce mechanics' liens, and it is settled by numerous decisions of this court that where the question of title to real estate is incidentally put in issue in a case in which jurisdiction is expressly conferred on the court of common pleas, its jurisdiction is not thereby ousted. *Holliday v. Spencer*, 7 Ind. 632; *Toner v. Mitchell*, 13 Ind. 530; *Fleming v. Potter*, 14 Ind. 486; *Vaughn v. Stuzaker*, 16 Ind. 338.

2. Overruling the demurrs to the several complaints is the next question urged for a reversal. The objection made is, that the notices of the liens filed in the recorder's office were void for want of a sufficient description of the property. This question is not properly raised by the demurrs. The complaints are good as causes of action, entitling the plaintiffs, at least, to personal judgments; and hence the demurrs were properly overruled. The question of the sufficiency of the notices might have been raised by a motion to strike out that part of the complaint relating to the lien, as in *Howell v. Zerbee*, 26 Ind. 214.

3. There was no error in refusing to require the plaintiffs to divide their complaints into two paragraphs. The suits were brought under the statute in relation to mechanics' liens, and the question of indebtedness and the right to the lien were properly presented in the same paragraph.

4. The objection urged to the deposition of Hubinger, one of the plaintiffs, was settled adversely to the appellants, in *Abshire v. Mather*, 27 Ind. 381.

5. The refusal of the court to grant a new trial is one of the errors assigned. One of the reasons filed for a new trial was, that the finding of the court is contrary to the evidence. The objection urged, in argument, to the evidence is, that it does not sustain the finding that the deed from Bourgette to Snyder was fraudulent and void as to the plaintiffs.

We have given to the evidence an attentive examination,

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and while it does not seem to us to show very conclusively that Snyder bought the property with the fraudulent purpose charged to him, yet, viewing it without those important tests of truth, the opportunity of seeing the witnesses, hearing them testify, and observing their conduct and appearance on the witness stand, which were afforded to the judge who tried the case in the court below, we think it still shows too many indications of a fraudulent purpose on the part of Snyder to justify us in saying that it does not sustain the finding.

Several other errors are assigned, but as they are not noticed or discussed by appellants' counsel, we have not examined them.

The judgment is affirmed, with costs.

W. & W. W. Herod and J. N. Kerr, for appellants.

R. Hill, G. W. Richardson, and F. T. Hord, for appellees.

ARNOLD and Others v. ARNOLD.

CONVEYANCE TO HUSBAND AND WIFE.—*Common Law.*—At common law, if a conveyance of real estate is made to a man and his wife, they are not joint tenants or tenants in common, but both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor.

SAME.—*Statute.*—Such was the law under the act of January 2d, 1818 (Rev. Stat. 1838, 398), and such is the law under the statutes of 1852 (1 G. & H. 259, secs. 7, 8).

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136	662
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140	426
142	224

APPEAL from the Hendricks Common Pleas.

RAY, C. J.—The appellants filed a petition for partition, alleging that one William Arnold died, intestate, in the year 1867, seized of an estate in fee simple in certain lands; that he left surviving him, as his only heirs, his widow, the

Keesling v. Truitt and Others.

appellee, and the appellants, the children of the marriage; and praying partition of the lands.

The appellee answered, admitting the facts stated, except as to one of the tracts of land mentioned in the petition, which she claimed was her exclusive property. The answer alleged that the tract in question was conveyed to herself and husband after their marriage, to wit, on the 11th day of December, 1838, by the mother of the appellee, and she claimed to hold said land as survivor, in fee simple. A demurrer was overruled to this paragraph. In *Davis v. Clark*, 26 Ind. 424, this question was settled in favor of the ruling of the court below. It was there held, that at common law, if an estate is granted, as in this case, to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered one person in law, they cannot take the estate by moieties. Both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other; but the whole must remain to the survivor. Such was the law in force at the date of the conveyance in this case. Act of January 2d, 1818, declaring what laws shall be in force (Rev. Stat. 1838, p. 306). The law was the same at the time of the death of the husband. 1 G. & H. 259, secs. 7, 8.

The judgment is affirmed, with costs.

S. T. Hadley, for appellants.

C. Foley, for appellee.

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KEESLING v. TRUITT and Others.

DOCUMENTARY EVIDENCE.—*Authentication.*—A tract book kept in a recorder's office, admitted in evidence, had the following heading: "List of lands sold in that part of Delaware county lying in the Indianapolis district, from the

Keesling v. Truitt and Others.

first sale up to the 1st of January, 1841;" and the following certificate of authentication was attached thereto: "Auditor's Office, Indianapolis, April 27th, 1841, I, Morris Morris, Auditor of Public Accounts, do hereby certify that the foregoing list of lands is correctly transcribed from the tract book on file in my office. M. Morris, A. P. A."

Held, that this was a sufficient authentication under the act of March 6th, 1861, 2 G. & H. 181, sec. 1.

COUNTY SURVEYOR.—*Fractional Sections*.—Survey by county surveyor to establish the corners between the south half of the north-east quarter of a fractional section, entered December 1st, 1832, and the north half of said quarter, entered September 13th, 1833, the former described on the tract book as 80 acres, the latter as 77.69 acres.

Held, that the corners should have been so established as to make the interior half quarter twenty chains wide.

APPEAL from the Delaware Circuit Court.

GREGORY, J.—This was an appeal from the county surveyor to the court below, under section 8 of the act of June 17th, 1852, 1 G. & H. 596. Keesling was the owner of the south half of the north-east quarter of section one, in township nineteen, range ten east, entered, December 1st, 1832. One Neptahlim Ross was the owner of the north half of the same quarter, entered by one John W. Rhodes, September 13th, 1833. The south half is described on the tract book as containing 80 acres, and the north half as containing 77.69 acres. The object of the survey was to establish the corners between the two half quarters.

The finding was against the appellant. Motion for a new trial was overruled; and final judgment. The first objection taken is, that the court below erred in admitting in evidence the tract book kept in the recorder's office of Delaware county. The heading of the book was as follows: "List of lands sold in that part of Delaware county lying in the Indianapolis District, from the first sale up to the first of January, 1841."

The following certificate of authentication was attached thereto:

"Auditor's Office,

"Indianapolis, April 27th, 1841.

"I, Morris Morris, Auditor of Public Accounts, do hereby

Keesling *v.* Truitt and Others.

certify, that the foregoing list of lands is correctly transcribed from the Tract Book on file in my office.

M. Morris, A. P. A."

This was a sufficient authentication under the act of March 6th, 1861. 2 G. & H. 181, sec. 1.

The survey was made on the principle of dividing the quarter section into two equal parts. This was wrong.

The act of Congress of April 24th, 1820, provides that "fractional sections, containing one hundred and sixty acres, or upwards, shall in like manner, as nearly as practicable, be subdivided into half-quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury. Dunlop's Laws of the United States, p. 616.

The instructions of the Secretary of the Treasury under this act, contain the following: "The lots in the extreme northern and western tiers of quarter sections, containing either more or less than the regular quantity, are always to be numbered as per example: Interior lots in such extreme tiers are to be twenty chains wide, and the excess or deficiency of measurement is always to be thrown on the exterior lots; elsewhere the assumed sub-divisional corner will always be a point equi-distant from the established corners." Manual of Surveying Instructions, p. 26.

The survey was made on a wrong principle, and the court below erred in overruling the motion for a new trial.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

W. March, for appellant.

C. E. Shipley, and *A. Kilgore*, for appellees.

Piper and Others v. Rhodes and Others.

PIPER and Others v. RHODES and Others.

GRAVEL ROADS.—*Articles of Association.—Name.*—The articles of association of a proposed gravel road company, which it was attempted to organize under the act of May 12th, 1852, set forth no name for the corporation. The words "Fairview Turnpike" were placed at the head of the articles. *Held*, that this was not a compliance with the statute (1 G. & H. 474, sec. 1) requiring the name assumed to be set forth, without which there can be no corporation.

SAME.—*Assessments.*—An order of the board of county commissioners appointing assessors to make an assessment under the act of March 11th, 1867, for such pretended corporation, was a nullity.

SAME.—*Estoppel.*—The owners of land proposed to be assessed, not being shareholders, and not having contracted with the company as a corporation, were not estopped, in a suit to enjoin the collection of an assessment, from denying the corporate existence of the company.

SAME.—*Payment of Subscriptions.—Directors.*—Under the act of May 12, 1852, it is the province of the directors, and not of the stockholders, to require payment from subscribers to the capital stock.

APPEAL from the Fayette Circuit Court.

GREGORY, J.—This was a proceeding to enjoin the collection of an assessment for the construction of a gravel road, made under the act of March 11th, 1867. There was an attempt to organize the company under the act of May 12th, 1852. That statute provides "that any number of persons may form themselves into a corporation for the purpose of constructing or owning plank, macadamized, gravel, clay and dirt roads, by complying with the following requirements: They shall unite in articles of association, setting forth the name which they assume, the line of the route, and the place to and from which it is proposed to construct the road, the amount of capital stock, and the number of shares into which it is divided, the names and places of residence of the subscribers, and the amount of stock taken by each, shall be subscribed to said articles of association." 1 G. & H. 474, sec. 1.

The following is a copy of the articles of association:

"Fairview Turnpike.

"Fairview, Fayette county, Indiana, March 8th, 1865.

"We, the undersigned, agree to pay the several sums an-

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nected to our names, for the purpose of constructing a gravel turnpike road in conjunction with the Fairview and Connersville Turnpike Road; commencing at the line between Rush and Fayette, in the village of Fairview, running on the section line east, three miles, to the end of the aforesaid Fairview and Connersville pike; the amount of capital stock forty-five hundred dollars, to be divided into ninety shares of fifty dollars each; payments to be made as the stockholders may agree when they meet to elect directors." Signed with the names of the stockholders, the amount of stock for which each subscribed, with the residence of each.

The defect in the articles of association is the omission of the corporate name. It is claimed that the heading, "Fairview Turnpike," is a sufficient compliance with the requirement of the statute in this respect. We think otherwise. It does not profess to be the name of the company.

The plaintiffs are not shareholders, but are the owners of land within one and one half miles of the line and terminus of the road.

The last clause of the articles of association tends strongly to show that it was not the intention to become a corporate body to be governed by the act of May 12th, 1852; for by section 11 of that act it is the province of the directors to require payment from subscribers to the capital stock.

It is claimed that the order of the board of commissioners appointing the assessors, not appealed from, is conclusive on the complainants. There must be a corporation to authorize the collection of assessments. Without this prerequisite the order of the commissioners is a nullity.

The appellants never contracted with the company as a corporation, nor were they connected with the attempted organization in any way to estop them from denying its existence. See *Williams v. The Franklin Township Academical Association*, 26 Ind. 310.

Jones and Others v. Theiss and Others.

The court erred in sustaining the demurrer to the amended complaint.

The judgment is reversed, with costs; cause remanded, with directions to overrule the demurrer to the amended complaint, and for further proceedings.

J. H. Melleit and M. E. Forkner, for appellants.

B. F. Claypool and J. C. McIntosh, for appellees.

JONES and Others v. THEISS and Others.

BOARD OF COUNTY COMMISSIONERS.—*Appeal from.—Turnpikes.*—Application to the board of county commissioners for permission to organize an association and construct a gravel road, under the act of 1865 (Reg. Sess. p. 90). A paper called a defense was filed by persons alleged therein to be owners of land which would be subject to be taxed for the construction of the proposed road, urging objections to the application. The application was granted. Appeal to the circuit court, where, on motion of the appellees, the appeal was dismissed.

Held, that an appeal might have been taken under section 31, 1 G. & H. 253, by filing with the county auditor an affidavit as required by that section; but,

Held, also, that as it did not appear that any such affidavit was filed, or that the persons taking the appeal were in a legal sense parties to the proceedings before the commissioners, the appeal was properly dismissed.

Query, whether the commissioners might admit persons having an interest in the subject of the application to make themselves parties defendants, upon proper petition verified by affidavit.

APPEAL from the Fayette Circuit Court.

ELLIOTT, J.—Theiss and others, the appellees, filed written petitions to the several boards of commissioners of the counties of Wayne, Union, and Fayette for permission to organize an association and construct a gravel road, under the provisions of the act of 1865, commencing at the north east corner of section 11, township 15, range 13; thence, on the section line, south three miles, in Wayne county; thence

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on the county line between the counties of Wayne and Union, one mile, to section 26; thence on the county line between the counties of Union and Fayette, to the Bentonville and Milton pike, being the termination of said proposed road, &c. The permission prayed was granted by the boards of commissioners of Wayne and Union counties. When the application came up for hearing before the board of commissioners of Fayette county, Jones and others appeared before the commissioners and filed a paper called a defense, in which several objections were urged to the application; among others, that the proposed road was not of public utility. It was also alleged that the appellants were the owners of land within three-fourths of a mile of the proposed road, which would be subject to be taxed for the construction thereof should the permission be granted. The record states that "the board, having examined the premises, overruled said defense to said application."

The board of commissioners also found that the proposed road would be of public utility, and granted the prayer of the petition. The appellants thereupon appealed to the circuit court.

The appellees appeared in the circuit court and moved to dismiss the appeal for want of jurisdiction in said court, and also because no appeal lies from the action of the commissioners in such cases. The motion was sustained and the appeal dismissed, to which the appellants excepted. This ruling is assigned for error.

The statute under which these proceedings were had does not require any notice of the application, nor does it contain any provision for a defense or other adversary proceedings, nor for an appeal from the decision of the board of commissioners.

Whether the commissioners would be authorized to admit persons having an interest in the subject of the application to make themselves parties defendants, upon a proper petition verified by affidavit, we do not determine, as the record before us does not present such a state of facts.

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We think, however, that the appellants might have appealed from the decision of the board of commissioners under section 31, 1 G. & H. 253, by filing with the county auditor an affidavit as required by that section. But, as it does not appear that the appellants were, in a legal sense, parties to the proceedings before the commissioners, nor that any such affidavit was filed, the circuit court did right in dismissing the appeal.

The judgment is affirmed, with costs.

J. B. & J. F. Julian, for appellants.

B. F. Claypool, for appellees.

REED's Administrator *v.* REED.

WILL.—*Trust.*—Bequest by J., "that my son S. shall receive of my estate the sum of \$200, to be paid him at the death of my wife, provided my wife shall outlive me; which said \$200 it is my wish my son S. shall add to the advancement he may make to his son R., when R. comes of age."

Held, that the bequest created a trust in favor of R., and that the legacy, received by S., on the death of J.'s wife, from the executor of J., was to go to R., on his arriving at majority, whether his father made any advancement to him or not.

DECEDENTS' ESTATES.—*Witness.*—On the trial of a claim against a decedent's estate for the amount of a legacy received by the decedent in his lifetime, in trust for the claimant, the plaintiff is not a competent witness, unless called by the adverse party or by the court.

APPEAL from the Fountain Common Pleas.

GREGORY, J.—Sampson S. Reed filed a claim against the estate of Stephen Reed in the clerk's office of the court below, on the 28th of August, 1867. The claim was not admitted by the administrator, and was therefore transferred to the issue docket, at the January term, 1868.

The plaintiff filed an amended complaint, in which it is averred that, by virtue of the last will and testament of

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James Reed, deceased, there was bequeathed to the plaintiff two hundred dollars, to be paid by the executor to Stephen Reed, upon the death of Sabina Reed, the wife of the testator, who, by the terms of the will, was to pay the same to the plaintiff. A copy of the will is made a part of the complaint, containing, among other things, the following bequest: "Fourthly, it is my will that my son Stephen shall receive of my estate the sum of two hundred dollars, to be paid him at the death of my wife, provided my wife shall outlive me; which said two hundred dollars it is my wish my son Stephen shall add to the advancement he may make his son Sampson S. Reed, when Sampson comes of age." The complaint further avers, that in 1853, and after the death of Sabina, the executor paid over the two hundred dollars to Stephen Reed, who during his lifetime failed and refused to pay it to the plaintiff, although demanded of him within six years before his death; nor has his administrator paid it, or any part thereof, since the death of the intestate."

The will bears date 23d of September, 1834, and was probated in Kentucky, in August, 1835.

The defendant demurred to the complaint, which was overruled, and he excepted.

The defendant answered: 1. The general denial. 2. That the cause of action did not accrue within six years before the commencement of the action or within six years before the death of the intestate, Stephen Reed. 3. That the cause of action did not accrue within fifteen years before the commencement of this suit. 4. Payment. 5. That after the plaintiff arrived at twenty-one years of age the said Stephen Reed made advancements to his son Sampson, in money, property, and use of farm, use of saw mill, and timber from farm, to the full amount of the two hundred dollars.

The plaintiff replied: 1. The general denial. 2. That the intestate did, within six years prior to his death, acknowledge his indebtedness and promise to pay the same. 3. That the cause of action did accrue within fifteen years.

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Trial by the court; finding for the plaintiff; motion for a new trial overruled. The evidence is made a part of the record. The will was put in evidence. The executor testified that he paid the two hundred dollars to Stephen Reed in 1852 or fall of 1854. Sampson S. Reed offered himself as a witness on his own behalf. The defendant objected, but the court allowed him to testify. The defendant excepted, and this is one of the causes assigned for a new trial. He testified that his father told him that he got the two hundred dollars in 1852 or 1853; that by the terms of the will it was not to be paid to him, the plaintiff, until his, the father's, death; that then the plaintiff would receive it out of his, the father's, estate; that he, plaintiff, was led by this to believe that he could not receive it until after his father's death; that his father, in his lifetime, did not make any advancement whatever to him.

William Reed, brother of the plaintiff, testified that Stephen Reed had admitted to him that he had received the two hundred dollars specified in the will, and that it was not to be paid to Sampson, the plaintiff, until after his, the father's, death; and then he was to have it out of his estate. It was in evidence that the plaintiff was forty-two years of age at the time of the trial.

It is claimed that the bequest created no trust in favor of the appellee, and therefore the complaint was bad on demurrer, and this presents the first question in the case.

In *Ford v. Foowler*, 3 Beav. 146, a bequest to a daughter, A., the wife of B., of 10,000*l.*, payable six months after the testator's decease, with the following words added: "I recommend to my said daughter and her said husband, that they do forthwith settle and assure the said sum of 10,000*l.*, together, also, with such sum of money of his own as the said B. shall choose, for the benefit of my said daughter A. and her children," was held to be a trust for the children after the decease of A., so that the legacy did not lapse by the death of A. in the testator's lifetime.

In *Mulim v. Keighley*, 2 Ves. 333, the Master of the

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Rolls stated the general rule on this subject thus: "Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly, that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it."

It is claimed in the case at bar that it was not the intention of the testator that the two hundred dollars should go to the grandson absolutely, on his arriving at the age of twenty-one years, but that it was only to go to him in case his father made advances to him.

In *Ford v. Fowler, supra*, the Master of the Rolls says: "It was argued that the subject was uncertain, because the testator recommended that, besides the 10,000 l. of his own, something of the husband's to be settled also; but there being certainty as to that which was in the testator's power, the trust as to this does not fail because the testator expressed a wish as to something over which he had no power. His wish or recommendation that the husband should settle something of his own is perfectly consistent with his wish or recommendation that the whole of the 10,000 l. should be settled, whether the husband settled anything or not."

So in the case under consideration, it is equally clear that the wish of the testator that the two hundred dollars should go to the grandson on his coming of age was consistent with the wish that it should be added to such sums as the father might elect to advance to his son.

The court below committed no error in overruling the demurrer to the complaint.

The appellee was not a competent witness unless called by the adverse party, or the court trying the case. See *Malady v. McEnary*, 30 Ind. 273.

It is argued that this was a harmless error; that other witnesses testified to the same facts. The evidence was material, and we cannot say what weight was given to it in the court below. The appellee, by offering himself as a witness on his own behalf, treated the testimony as mate-

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rial. For this error a new trial ought to have been awarded.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial, and for further proceedings.

W. H. Mallory, for appellant.

J. Ristine, for appellee.

MAIDEN *v.* WEBSTER.

PROMISSORY NOTE.—*Joint and Several.*—A promissory note commencing, "I agree to pay," &c., and signed by two, is joint and several, and the holder may at his election sue one or both of the makers.

PRACTICE.—*Parties.—Joiner of.*—Under the code, in a joint action against two, as makers of a joint and several promissory note, both of whom have been duly served with process, the plaintiff, having by leave of court dismissed as to one, may proceed to judgment against the other; and such judgment, remaining in force against the latter, is no bar to a subsequent suit on the note against the former.

PARTNERSHIP.—*Evidence.—Pleading.*—Evidence that the makers of a joint and several note, purporting to be made by two, were partners at the time of its execution, and that it was given by one in the names of both, in the business of the partnership, is admissible, in proof of its execution put in issue by the other maker in a suit against him on the note, though the note does not purport to be given by or in the name of a firm, and the complaint contains no allegation of such partnership.

APPEAL from the Montgomery Common Pleas.

ELLIOTT, J.—Webster sued Maiden on a promissory note as follows:

"Remington, Oct. 15th, 1864.

"For value received I agree to pay Reuben Webster one thousand dollars, one day after date, waiving relief from valuation or appraisement laws. S. Sheeks.

T. G. Maiden per Sheeks."

Maiden answered: first, the general denial, concluding

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with the averment that he did not make or execute said note, nor did he authorize any one to do so. This paragraph is sworn to.

The second paragraph alleges that the plaintiff had theretofore commenced a suit on the same note against the defendant jointly with the administrator of Sheeks, the other maker, in the Court of Common Pleas of Jasper county; that process was duly served on them; that he (Maiden) appeared in said court and answered said action; and that during the trial thereof the plaintiff, by leave of the court, dismissed said action as to this defendant, and recovered judgment therein for the amount due on the note, against the administrator of Sheeks; which judgment remains in full force, &c. The proceedings and judgment referred to were made a part of the answer.

A demurrer was sustained to the second paragraph of the answer, to which Maiden excepted. A trial of the issue made by the first paragraph resulted in a verdict and judgment for the plaintiff. A motion for a new trial being overruled, Maiden appeals.

Sustaining the demurrer to the second paragraph of the answer, is the first error complained of here. The note, in legal effect, is joint and several. The holder might, therefore, at his election sue one or both of the makers, and, at common law, having elected to sue both, the holder could not take judgment against one alone, unless the process were returned "not found" as to the other. *Gibbons v. Surber*, 4 Blackf. 155. Under the rule stated in that case, the plaintiff here could not have dismissed the suit in the Jasper Common Pleas as to Maiden, and then have proceeded to judgment against the administrator of Sheeks. But the law on this subject is materially modified by the provisions of the code. Thus, the 20th section provides, that "persons severally and immediately liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiffs."

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The third clause of section 41 declares, that "if all the defendants have been served, judgment may be taken against any or either of them severally when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone." And so section 99 provides, that "the court may at any time, in its discretion, and upon such terms as may be deemed proper, for the furtherance of justice, direct the name of any party to be added or struck out."

Under these provisions, the plaintiff, by dismissing the suit in the Jasper Common Pleas as to Maiden, changed it from a joint to a separate action against the administrator of Sheeks alone, and hence the judgment in that suit against the administrator is no bar to a subsequent action against Maiden. There was no error in sustaining the demurrer.

The only remaining question arises upon the refusal of the court to grant the appellant a new trial.

One of the grounds urged for a new trial is the alleged improper admission of certain evidence on the trial. It appears by a bill of exceptions that the plaintiff below was permitted to prove, over the appellant's objection, that the note sued on was given for money loaned, and that at the date of the loan and the execution of the note the appellant and Sheeks kept a warehouse and were in partnership in the wheat trade, and that the money was loaned to them as partners, and was used in their partnership business, the note being executed by Sheeks in both their names. The plaintiff below was also permitted to prove, over the appellant's objection, that in the summer and fall of 1864, the appellant told one Briers and one McDaniels that he was in partnership with Sheeks in the grain trade and town lots. The objection urged to the evidence is, that the note does not purport to be given by or in the name of a firm or partnership, and that the complaint contains no allegation of the existence of such partnership; from which it is claimed that the plaintiff below could only fix the liability of the appellant by

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proving that he executed the note in person, or expressly authorized some one else to execute it for him.

No authority is referred to in support of the position assumed, and we know of none. The appellant denied the execution of the note under oath, which threw on the appellee the burthen of proving its execution. If the appellant executed the note through an agent authorized to put his name to it, then it was his note. Partners are mutual agents of each other in all things which respect the partnership business; and hence the act of one in the name of all, or for the benefit of all in their common business, is deemed obligatory upon all the partners. Story on Agency, § 37. If the appellant and Sheeks were partners in the grain trade, and if Sheeks borrowed the money for the use of the firm, then, as one of the partners, he was the agent of the other, the appellant, and as such was authorized to sign the appellant's name to the note, and it thereby became the note of the appellant. Ordinarily, perhaps, partners agree upon a partnership name, in which, as a matter of convenience, the business of the partnership is conducted. This, however, is not required by the law, and a note given in the business of the partnership is none the less a partnership note because it is executed by the full names of all the partners. Nor was it necessary, in suing on the note, that the complaint should allege a partnership between the makers.

There was no error in admitting the evidence.

The judgment is affirmed, with five per cent. damages, and costs.

GREGORY, J., was absent.

M. D. White, and *T. Patterson*, for appellant.

S. C. Wilson, and *J. M. Butler*, for appellee.

The Jeffersontown, Madison, and Indianapolis Railroad Company *v.* Nichols.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD COMPANY *v.* NICHOLS.

RAILROADS.—*Injury to Animals.—Fences*.—The object of the statute providing compensation for animals killed or injured by the cars, &c., of railroad companies is the protection of the public, and not simply to compensate the owners of the animals; and the fact that the owner of the land has for a long period, without any contract to that effect, maintained a sufficient fence, does not, so far as the public is concerned, relieve the company from the duty imposed by the statute. While the fence is so maintained the company is not liable to the penalty provided by law, but that penalty is incurred whenever the failure to maintain the fence as required may happen.

SAME.—*Pleading*.—The want of reasonable time to repair the fence would excuse the company, but the allegation, in an answer by the company, that the fence was out of repair but a short time, is too indefinite.

APPEAL from the Bartholomew Circuit Court.

RAY, C. J.—The appellee, who was the plaintiff below, filed his complaint against appellant in four paragraphs, alleging:

1. That on the 26th day of August, 1867, the defendant was running a locomotive and train of cars over its road in said county; that while being so run as aforesaid, said locomotive passed over and killed one mare of the value of one hundred and fifty dollars and one filly of the value of one hundred and twenty-five dollars, belonging to plaintiff; that the road was not then and there fenced in by defendant, as required by statute; that the killing was at a place where the road could have been fenced, and was not at the crossing of any highway, &c.

2. That on the 26th day of August, 1867, the defendant negligently and carelessly, and without any negligence on the part of the plaintiff, struck, passed over, and killed, one mare of the value of one hundred and fifty dollars and one filly of the value of one hundred and twenty-five dollars, &c.

3. Same as second, except that it charges that the mare was injured, crippled, and wounded, so that she had to be killed.

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4. Same as first, except that it charges that the mare was injured, crippled, and wounded, so that she had to be killed.

The defendant demurred to each paragraph of the complaint. The demurrers were overruled, and defendant excepted, and thereupon filed an answer in six paragraphs.

1. The general denial.

2. That the plaintiff was, and for a long time had been, owner of the land adjoining the road where the stock was killed, and had for a long time kept said land enclosed by a fence, one string of which ran along the road, such as good husbandmen in that neighborhood usually kept; that it was so enclosed at the time of the killing of the stock, which were at that time enclosed therein; and that they escaped over the fence on to the track, and were killed without any fault or negligence on the part of the defendant.

3. Same as second, with the additional allegation that the fence was a board fence; that the top board of one panel had been torn off but a short time previous thereto, whereby the stock escaped; and that the fence with the board off was such a fence as good husbandmen in that neighborhood usually kept.

4. Same as second, without the allegation that the fence was such as good husbandmen usually keep.

5. Same as second, with the additional allegation that at the time of the killing one panel of the fence was partially down, through which the stock escaped on to the track, when they were killed without fault or negligence on the part of defendant; and that the plaintiff, though he knew of the defect in the fence, suffered his stock to remain in the field, without repairing the fence.

6. Same as second, with the additional allegation that at the time of the killing one panel of the fence was partially down, through which the stock escaped on to the track, where they were killed without any fault or negligence on the part of the defendant; that the fence had been so out of repair but a short time; and that the defendant

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had no knowledge of it at the time of, or before, the killing of said stock.

The court sustained demurrers to the fifth and sixth paragraphs of the answer, to which the defendant excepted.

Plaintiff filed reply to the second, third, and fourth paragraphs.

1. The general denial.

2. That the fence was broken down by the defendant's agents and employees, who suffered the same to remain out of repair; and that, in consequence of such breaking down, &c.

3. That the defendant did not properly maintain the fence, in this, that it permitted the top board of one panel thereof which had been torn off a short time previously, to remain off, and would not and did not repair the same, and that in such condition it was not such a fence as good husbandmen in that neighborhood usually keep; in consequence whereof, &c.

4. That about one year previous to the killing, the defendant had burned up and destroyed a large part of the fence by fire communicated from its locomotives while being run in the ordinary line of duty; since which time the plaintiff had abandoned the fence and all efforts to keep the same in repair; and defendant had not repaired the same; in consequence whereof, &c.

The defendant demurred to the second, third, and fourth paragraphs of this reply; the court overruled the demurrs, and defendant excepted..

Trial by the court and finding for the plaintiff of \$275. A motion for a new trial was overruled, and defendant excepted. Judgment for plaintiff for \$275.

Assignment of errors:—

1. The court below erred in sustaining demurrer to the fifth paragraph of answer.

2. The court below erred in sustaining demurrer to the sixth paragraph of answer.

3. The court below erred in overruling demurrer to second paragraph of reply.

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4. The court below erred in overruling demurrer to amended third paragraph of reply.

5. The court below erred in overruling demurrer to fourth paragraph of reply.

The appellant insists that the fifth paragraph of the answer is good. The argument is, that the appellee did, in fact, keep up a sufficient fence for six years, and thereby relieved the company from the duty imposed by statute. But the object of the statute is the protection of the public, and not simply to compensate the owners of the animals; and, although while the fence is maintained, without any contract to that effect, by the owner of the land, the company is not liable to the penalty provided by law, still the duty, so far as the public is concerned, rests upon the company, and the penalty is incurred whenever the failure to maintain the fence as required may happen. It is true that reasonable time should be allowed to repair, or rather the want of reasonable time would excuse; but the excuse should be shown either by answer or proof. Neither the fifth nor sixth paragraph of the answer does this, and they are neither of them therefore sufficient. The allegation that the fence was out of repair but a short time, is too indefinite. The liability to keep the fence in repair resting upon the defendant, the third and fourth paragraphs of the reply were each sufficient.

The judgment is affirmed, with costs.

S. Stansifer and F. Winter, for appellant.

R. Hill and G. W. Richardson, for appellee.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
COMPANY *v.* BREVOORT.

RAILROADS.—*Injury to Animals.*—*Statute Construed.*—The act to provide compensation to the owners of animals killed or injured by the cars, &c. (Acts

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1863, p. 25), does not apply when the killing or injury occurs at a point at which the road cannot be legally fenced in.

SAME.—*Pleading.*—The fact that the company is not bound to fence at the place where the killing or injury occurs is purely a matter of defense, and need not be negatived in the complaint.

SAME.—*Pleading.*—*Evidence.*—Animals killed or injured at different times constitute separate and distinct causes of action, each of which should be stated in a separate paragraph of the complaint; and where the complaint indicates but one cause of action, the plaintiff should be confined, in his evidence, to a single transaction.

SAME.—*Jurisdiction.*—Two or more causes of action cannot be united in the same suit for the purpose of giving the Circuit or Common Pleas Court jurisdiction, which is wanting when the value of the animal or animals killed, or the injury done, at the same time, does not exceed fifty dollars.

APPEAL from the Bartholomew Common Pleas.

ELLIOTT, J.—Brevoort sued the Jeffersonville, Madison, and Indianapolis Railroad Company to recover the value of stock killed by a locomotive and train of the latter running on the line of its road.

A demurrer to the complaint was interposed, but overruled. Issues of fact were then formed and tried by a jury, who found for the plaintiff, and assessed his damages at one hundred and twenty-one dollars. A motion for a new trial was overruled, and judgment rendered on the verdict.

It is insisted by the railroad company, the appellant, that the court erred in overruling the demurrer to the complaint.

It is averred in the complaint, that the animals were killed on the railroad at a point where the same was not fenced. It is contended that this is not sufficient, but that the pleader should have gone further, and alleged that the killing occurred at a place where the company was bound to fence. There is nothing in the objection. The 5th section of the act (Acts 1863, p. 26) makes the railroad company liable for the value of all animals killed, &c., without regard to the question whether such killing was the result of willful misconduct or negligence, or the result of unavoidable accident. No exception is made in the section. But section 7 provides that the act shall not apply to any railroad securely fenced in, &c. And in construing the act, it has

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been repeatedly held by this court, that it did not apply to a case where it appeared that the killing occurred at a point where the road could not be legally fenced in. It is purely a matter of defense, and need not be negatived in the complaint.

One of the causes for a new trial is, that the court erred in admitting certain evidence which was objected to by the appellant.

The complaint consists of a single paragraph, or cause of action. It alleges that a train of cars of the appellant ran over and killed the stock of the defendant, as follows:

1867.	November 14th,	one work ox of the value of \$80.00
"	"	" one steer, crippled and dam- aged,..... 25.00
"	"	" one heifer, crippled and dam- aged,..... 25.00
"	"	" four sheep, of the value of \$3 each,..... 12.00
"	"	" one sheep, crippled and dam- aged,..... 3.00

It appears by a bill of exceptions that on a trial of the cause the plaintiff first introduced evidence to show the killing of the ox and heifer by the train at one time, on the 16th of November, 1867, and then introduced a witness and offered to prove the killing of the sheep of the plaintiff before the loss of the ox and heifer, and at another and different time; to which the appellant objected, on the ground that under the pleadings the plaintiff below could only prove a single transaction, or cause of action; but the court overruled the objection, and the witness thereupon testified that several days before the killing of the ox and heifer, three sheep of the plaintiff were killed by a train on the railroad, of the value of three dollars each.

This was error. The third sub-division of section 49 of the code requires that "where the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered." It has been repeat-

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edly held under the statute, that animals killed at different times constitute separate and distinct causes of action. *The Indianapolis &c. R. R. Co. v. Elliott*, 20 Ind. 430; *The Indianapolis &c. R. R. Co. v. Kercheval*, 24 Ind. 139; *The Toledo &c. R. R. Co. v. Tilton*, 27 Ind. 71.

Here there was nothing in the complaint to indicate that the plaintiff sought to recover for more than one cause of action, and he should have been confined, in his evidence, to a single transaction.

The evidence was improper for another reason. The court of common pleas has no jurisdiction, under the statute, unless the value of the animal or animals killed or injury done, at the same time, exceeds fifty dollars. And two or more causes of action cannot be united in the same suit for the purpose of giving the circuit or common pleas court jurisdiction. This point is fully settled in the cases above cited. The court, therefore, had no jurisdiction of the cause of action for killing the sheep, their value being less than fifty dollars, and hence the evidence should not have been admitted.

The judgment is reversed, with costs, and the cause remanded for a new trial.

S. Stansifer and F. Winter, for appellant.

HALLOCK and Another v. IGLEHART and Another.

PRACTICE.—Motion to Strike Out.—Where the court, on motion, has stricken matter from a pleading, and all the facts set forth in the part so stricken out are afterwards admissible in evidence as before, and no evidence of such facts is offered, there is neither error in form nor injury to the pleader in striking out such matter.

SAME.—Motion for New Trial.—Refusal of Instructions.—If the refusal of the court to instruct the jury as requested is not made a ground of a motion for a new trial, the question will not be considered by the Supreme Court.

SAME.—Instructions to Jury.—The Supreme Court will not reverse a judg-

Hallock and Another v. Iglehart and Another.

ment because an instruction to the jury, though a correct statement of the law, and expressed in fit language to be comprehended by a lawyer, is not so explained that the jury will surely understand it, if the explanation be not asked and refused below.

APPEAL from the Vanderburgh Common Pleas.

FRAZER, J.—This was a suit by attorneys to recover the value of professional services. They had judgment below for four thousand dollars.

A portion of the fourth paragraph of the answer was stricken out, on motion, and this is assigned for error. But the matter stricken out was a mere repetition of an averment which remained, in the same paragraph, as well as in the second, and under which the facts were all admissible in evidence, if proper to be proved at all. No such evidence was offered, however, and there was therefore neither error in form nor injury to the appellants in striking it out.

It is urged, that the court below erred in refusing to instruct the jury as requested by the appellants; but, inasmuch as this refusal was not made one of the grounds of the motion for a new trial below, the question cannot be considered here.

The defense was unskillfulness and want of care by the plaintiffs in performing the business, whereby the defendants were damaged, &c. There was no evidence given to the jury tending to prove this defense, and therefore it was not required that any instruction as to the liability of an attorney for negligence or want of care should have been given. Nor could any error in instructions upon that subject have injured the defendants. Without any evidence upon the question, it was not the duty of the jury to consider it, and the court might, with propriety, have so instructed. We do not, under such circumstances, feel called upon to discuss the instructions which were given, regarding the questions which are made upon them as being entirely abstract, and having no influence upon the case presented by the record.

Colerick and Others v. Bowser and Others.

An instruction pertinent to the evidence is complained of, though it is admitted to be a correct statement of the law. It is objected to it that, though expressed in fit language to be comprehended by a lawyer, yet it should have been so explained that the jury would surely understand it. If this were conceded, yet we could not reverse the case unless the explanation had been asked and refused.

Finally, it is urged that the damages assessed were excessive. The evidence would, on appeal, have supported a larger verdict.

The judgment is affirmed, with three per cent. damages, and costs.

J. G. Jones and R. A. Hill, for appellants.

A. Iglehart, for appellees.

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COLERICK and Others v. BOWSER and Others.

PROCESS.—*Revenue Stamps*.—It was not necessary in a suit commenced September 20th, 1867, that the process should be stamped with a revenue stamp.

APPEAL from the Allen Common Pleas.

GREGORY, J.—Suit by the appellees against Edward F. Colerick and wife and Daniel Ammon, to foreclose a mortgage executed by Colerick and wife to one Griffith, and by the latter assigned to the plaintiffs. Colerick and wife, who were served in time, the process however not being stamped, were defaulted. Ammon answered, setting up subsequent mortgages executed by Colerick and wife to him, and averring that he had no notice of the lien of Griffith or the plaintiffs.

Trial by the court; finding for the plaintiffs; decree of foreclosure and sale, and an order of payment of the mort-

Nebeker and Others v. Rhoads and Others.

gage debts according to their priority as found by the court.

There was no motion for a new trial; nor was there any exception taken to the action of the court below. There is no assignment of error as to the sufficiency of the complaint. The record presents no question for the consideration of this court, except, perhaps, the validity of the process. It is claimed that this was void, because it was not stamped under the revenue laws of the United States. This suit was commenced on the 20th of September, 1867. The law requiring writs to be stamped was repealed March 2d, 1867. *Acts of Congress, 1867, p. 108, sec. 9.*

The judgment is affirmed, with costs and five per cent damages.

J. A. Fay, for appellants.

W. H. Coombs, and W. H. Miller, for appellees.

NEBEKER and Others v. RHOADS and Others.

AMENDMENT AND REPRAL OF LAWS.—*Descentis.—Widow.—Leard et al. v. Leard,*
p. 171, *supra*, affirmed.

APPEAL from the Fountain Circuit Court.

FRAZER, J.—The questions in this case were, after full consideration, decided adversely to the views pressed upon us by the present applicant, in *Leard et al. v. Leard*, at this term. We have no doubt whatever of the soundness of the conclusions then reached, nor indeed of the wisdom and policy of the act of March 9th, 1867, as then expounded. The act was absolutely necessary to the purposes of justice and the repose of titles long unchallenged in consequence of some decisions of this court not well considered, but which, if adhered to, would, it was seen, be productive of constantly recurring mischiefs of the most alarming na-

Garner v. Cook and Another.

ture, some of which were indicated in *Greencastle, &c. Co. v. The State. ex. rel. &c.*, 28 Ind. 382. The statute in question was evidently passed so that if the doctrine of *Langdon v. Applegate* should be overruled no inconvenience would result.

The judgment is affirmed, with costs.

T. F. Davidson, for appellants.

W. H. Mallory, for appellees.

GARNER v. COOK AND ANOTHER.

PROMISSORY NOTE.—Parties.—Evidence.—The equitable owner of a promissory note may sue upon it in his own name, and possession of the note is evidence of such ownership.

JUSTICE OF THE PEACE.—Pleading.—Suit by A. and B. before a justice of the peace. The complaint was a promissory note executed by the defendant to D., without indorsement. There was no express averment that the plaintiffs owned the note.

Held, that this was a sufficient complaint.

BASTARDY.—Compromise of.—Infancy of Mother.—Answer, in a suit upon a promissory note against the maker, that the consideration of the note was the compromise of a bastardy case and that the mother, the payee, was an infant.

Held, that the maker could not avail himself of the minority of the payee, and there was no error in striking the allegation thereof from the answer.

Held, also, that if the compromise was not consummated by the proceedings in court necessary to make it obligatory, that fact should have been alleged in the answer.

APPEAL from the Warren Circuit Court.

FRAZER, J.—This cause was commenced before a justice of the peace. Mary Jane Cook and Daniel Cook were plaintiffs and Peter Garner was defendant. The complaint filed was a promissory note payable to Mary Jane Coghill executed by the defendant, was without indorsement, and there was no express averment showing that the plaintiffs

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owned the note. It is contended that this was not sufficient as a complaint. We think otherwise. When *Vandagrift v. Tate*, 4 Blackf. 174, was decided the equitable owner of a note could not sue upon it in his own name; now he can; and the possession of the note is evidence of such ownership. Then a note payable to A. and not indorsed would show no right of action thereon in favor of B., but the law is otherwise, and therefore the reason for the ruling in the case cited does not now exist.

An answer that the consideration of the note was the compromise of a bastardy case, and that the mother of the child, the payee, was an infant, not showing whether or not satisfaction with the compromise was subsequently acknowledged by her in court, was not sufficient, and there was no error in sustaining a demurrer to it, or in first striking out a part of it. The minority of the woman was unimportant, as the defendant could not avail himself of it; and if the compromise was not consummated by the necessary proceeding in court to make it obligatory, that fact should have been alleged.

The judgment is affirmed, with costs.

J. McCabe, for appellant.

L. T. Miller and *J. Park*, for appellees.

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130	312
130	549

PIEL v. BRAYER and Others.

SHERIFF'S SALE.—*Sale in Parcels.*—The provision of the statute requiring that in sales of land by the sheriff, "if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately, and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division," applies to sales on the foreclosure of a mortgage, as well as to sales on execution.

SAME.—*Void Sale.*—If the sheriff, in violation of the statute, offer and sell in one body several distinct tracts or parcels of land, the sale is void.

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SAME.—*Vendor and Purchaser.*—*Notice.*—A judgment plaintiff purchasing at sheriff's sale is chargeable with notice of all irregularities in the sale; and his vendee is chargeable with notice of the contents of the record.

SAME.—*Presumptions.*—The rule that the sheriff is presumed to have done his duty in making the sale does not apply where the fact that the sale was in violation of the statute is apparent on the face of the record through which the title is claimed.

SAME.—*Foreclosure.*—*Decree.*—Where a complaint is filed for the foreclosure of a mortgage upon which there is due any interest or installment of the principal, and there are other installments not due, the court is required to ascertain whether the property can be sold in parcels; but where the whole sum secured is due, no such question can properly be presented to the court; and in the latter case, though the decree direct otherwise, if the land consists of separate parcels, it is the imperative duty of the sheriff to offer them separately, and if of a single tract, but susceptible of division without injury, and the sale of the whole is not necessary to satisfy the execution, he is required to divide it, and offer, at one time, only so much as may be necessary to satisfy the judgment, interest, and costs.

APPEAL from the Marion Civil Circuit Court.

This was a suit by Piel, the appellant, against Brayer, Schwier, and Brandt. The complaint, which was filed on the 23d of May, 1866, alleges, *inter alia*, that the plaintiff, on the 25th of November, 1857, executed to the defendant Brayer a note for one thousand six hundred dollars, payable one year after date, with interest, and without relief from valuation or appraisement laws. And, at the same time, the plaintiff executed to Brayer a mortgage on certain real estate, in which his wife joined, to secure the payment of said note at maturity; that on the 12th day of May, 1866, the plaintiff tendered to Brayer the sum of two thousand five hundred and fifty dollars, being more than the principal and interest then due on said note, and requested that the mortgage be satisfied of record; but that Brayer refused to receive the money or satisfy the mortgage, and claimed that he had become the purchaser of the mortgaged property, and that the mortgage had been satisfied; which, the complaint alleges, is untrue; and further states that the defendants Schwier and Brandt claim to hold a lien on the real estate mortgaged, or some interest therein, "the precise nature of which the plaintiff is unable

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to state." The money alleged to have been tendered is claimed to be brought into court, and the complaint concludes with a prayer for proper relief.

Brayer filed a separate answer in two paragraphs. The first alleges that after the note became due, he instituted a suit against the plaintiff in the Marion Circuit Court on said note and mortgage, and such proceedings were had therein that a judgment was rendered against the plaintiff for the amount of the note and interest, and a foreclosure of the mortgage, and an order for the sale of the mortgaged premises to satisfy the judgment; that, the judgment remaining unpaid, a certified copy of the same was issued by the clerk, and delivered to the sheriff of Marion county, who afterwards, on the 27th day of December, 1860, having first given due notice of the time and place of sale, sold the mortgaged premises at public auction to said Brayer for three hundred dollars, he being the highest bidder therefor, and on the 29th of the same month executed to him a deed for the same.

The second paragraph, in addition to the facts stated in the first, alleges that in the decree the mortgaged premises are at one time incorrectly and by mistake described as "the said lot No. 144, in Noble's addition to the city of Indianapolis, as aforesaid described, with the improvements thereon," but that prior to the erroneous description the property is correctly described in the decree, the same as it is described in the mortgage; and that the sheriff, in his advertisement and sale, used the correct description. The paragraph prays that the erroneous description in the decree be corrected, and the title acquired by the sale be decreed valid. A copy of the judgment and decree and subsequent proceedings is made a part of the answer.

Schwier and Brandt filed a joint answer, setting up substantially the same facts as the answer of Brayer; and also alleging that Brayer, after he purchased the real estate at sheriff's sale, under the decree of foreclosure, sold and conveyed the same to them for two thousand dollars, which

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they paid; and claim that their title is a valid one, but that the pretended claim of ownership by the plaintiff casts a shade upon their title; wherefore they claim that the same be quieted, and that the plaintiff be enjoined from setting up any adverse claim to the property, &c.

They also make a copy of the judgment and decree of foreclosure and subsequent proceedings a part of their answer.

Separate demurrers were filed to the several answers; when, on motion, supported by an affidavit that the title to real estate was involved in the issues, the cause was transferred from the Common Pleas to the Circuit Court.

The demurrers to the answer were subsequently overruled by the Circuit Court, to which the plaintiff excepted.

The plaintiff then filed a reply to the answer of Brayer, alleging that the sale of the mortgaged premises by the sheriff to Brayer was illegal and void, for the reasons:—

First, on account of the erroneous description of the property in the decree, referred to in the second paragraph of said answer; and,

Second, that the real estate described in the mortgage consisted of three different, distinct, and separate lots; that the east half of the first described parcel constituted one lot of about twenty-two feet, fronting on the National road, or Washington street, extending east and running back to a public alley of —— feet; and said lot had thereon a two story house, of the value of about two thousand dollars, and then of the annual rental value of three hundred dollars; that the west half of the above described parcel constituted another lot of about the same dimensions, fronting on the same street, and running back to the same alley, and having thereon a one story house of the value of about one thousand dollars, and of the annual rental value of about one hundred dollars; that said houses and lots were in no way connected together, except that they lay adjoining each other, and there was a passage way for wagons and drays between said improvements, and on and over the line

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that divided said two lots; that the east half of said property was, at the time of sale, worth at least two thousand five hundred dollars, and the west half one thousand five hundred dollars; that the remaining portion of the real estate described in the mortgage was and is separated from the first piece described therein by a public alley, and was on the north side thereof and fronted to the north, and on the extension of Market street, and was worth the sum of one thousand dollars; that the first piece described in the mortgage fronted south, and was on the south side of said alley; that they were on opposite sides of the alley, and wholly disconnected; that said real estate could have been sold in three separate and distinct parcels, and could have thus been sold to much better advantage than all together, and would have brought more money; that the plaintiff requested said Brayer and the sheriff to sell said real estate in parcels, in order that there might be competition, and that it might bring more money; but they refused, and sold all said real estate in a body.

A reply in two paragraphs was also filed to the answer of Schwier and Brandt.

The first avers, that while the decree under which the sheriff's sale was made directed lot number 144 in Noble's addition to the city of Indianapolis to be sold, the real estate described in the mortgage was not in Noble's addition to said city, but in an entirely different piece; that the plaintiff is a foreigner by birth, has but an imperfect knowledge of the English language, and had no knowledge of this defect in the decree until about a week before the beginning of this suit; that upon discovering the defect in the decree, he tendered said defendants the full amount of the mortgage and interest, and all taxes and costs, and requested them to convey the property to the plaintiff, which they refused to do; that the plaintiff had no knowledge of any negotiations between said defendants and said Brayer, in reference to said real estate, or of their paying him any money; nor had he any knowledge that they were about

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to make any improvements, nor have they, in fact, made any.

The second paragraph avers the same facts as the first, as to the defect in the decree as to the description of the property, his ignorance of the English language, and his ignorance of the existence of the defect. It denies any knowledge of negotiations between said Brayer and the defendants, and of the payment of any money by the latter to the former. It charges that the negotiations, etc., were prior to the sheriff's sale. It denies the allegations of the answers, with reference to the yielding up possession, rent, etc., and avers that all the plaintiff did and permitted to be done was in ignorance of the misdescription of the real estate and of his legal rights; that he did not know, and does not now know, that the defendants contemplated making improvements; that as soon as he discovered the defect in the decree, he tendered to said Brayer and said defendants, the amount of the principal and interest of the mortgage, and all costs and taxes, and requested a re-conveyance and satisfaction of the mortgage; and they refused to receive the money and make said conveyance or enter satisfaction. He avers his readiness to pay into court whatever sum of money may be necessary to satisfy said mortgage.

The court sustained demurrers to all the replies, and the plaintiff refusing to reply further, judgment was rendered for the defendants.

ELLIOTT, J.—The only questions presented in the case for our determination arise from the action of the court below in overruling the demurrers to the answers, and in sustaining those to the replies.

Are the facts set up in the answers sufficient to bar the action? Two objections are urged by the appellant to the validity of the sheriff's sale.

First, that the error in the description of the mortgaged
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premises in the decree of foreclosure is fatal to the sale made under it; and,

Second, that the real estate mortgaged consists of two separate and distinct tracts, or parcels, as is shown by the description thereof in the mortgage, and in the decree of foreclosure, and that the sheriff illegally offered and sold both parcels together, instead of selling each parcel separately.

The description of the property in the mortgage, and where it is correctly described in the decree of foreclosure is as follows:—

“A certain parcel of land, situate in out-block number 72, of the donation lands of the city of Indianapolis, and enclosed in the following boundaries: commencing at a point on the south line of said out-block number 72, fifty feet west of the south-east corner of said out-lot; thence running north to an alley for one hundred and fifty-eight feet, more or less; thence west for forty-four feet, six inches, along the south line of said alley; thence running south for one hundred and fifty-eight feet, more or less, to the south boundary of said out-block number 72; thence running east to the place of beginning. Also, another parcel of land, likewise situate in said out-block number 72, and enclosed in the following boundaries: commencing fifty-five feet west of the north-east boundary of said out-lot; thence running along the north line of said out-block 72, for fifty-five feet; thence south for one hundred and sixty-one feet, more or less, to an alley; thence east along the line of said alley for fifty-five feet; thence north to the place of beginning.”

The conclusion to which we have arrived upon the second proposition renders the examination of the first unnecessary. It appears by the sheriff's return to the order of sale that the whole of the mortgaged premises were offered and sold in one body at the same time to the defendant Brayer, the mortgagee, for the sum of three hundred dollars. The description of land in the mortgage shows that it con-

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sisted of two several lots, or parcels, which were separated by an alley. The statute provides that "if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same shall not be susceptible of division." 2 G. & H. 249, sec. 466. This provision applies to sales on the foreclosure of a mortgage with like force as to sales on execution. 2 G. & H. 295, sec. 635. And it is well settled by numerous decisions of this court, that if the sheriff, in violation of the statute, offer and sell several distinct tracts or parcels of land in one body, the sale is void. *Sherry v. Nick of the Woods*, 1 Ind. 575; *Reed v. Diven*, 7 Ind. 189; *Banks v. Bales*, 16 Ind. 423; *Tyler v. Wilkerson*, 27 Ind. 450. Brayer, the judgment plaintiff, being the purchaser at sheriff's sale, is chargeable with notice of all irregularities in the sale. Nor do we think that Schwier and Brandt can claim to be innocent purchasers without notice that the sheriff exceeded his power in selling both parcels of the land in one body. They purchased from Brayer and derived their title through the mortgage, decree of foreclosure, and the sheriff's sale, and are chargeable with notice of the contents of the record, and are presumed to know the law. The description of the land in the mortgage and decree of foreclosure shows that it consisted of two separate lots, or parcels; and the sheriff's return to the order of sale, which is a part of the record, shows that both parcels were sold together in one body: they are therefore chargeable with notice of the fact that the sale was in violation of the statute; and, as the fact is apparent on the face of the record through which they claim title, the rule that the sheriff is presumed to have done his duty in making the sale does not apply to the case. See *Doe v. Collins*, 1 Ind. 24.

The decree of foreclosure was rendered on default; and immediately following the erroneous description of the land ordered to be sold, in which it is described as lot number

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144 in Noble's addition to the city of Indianapolis, occurs the following: "Said plaintiff having shown said real estate cannot be sold in parcels without injury, that the sheriff sell the land to the highest bidder," &c. It is insisted by the appellees that this provision of the decree was binding on the sheriff, and rendered the sale of both parcels of the land together a valid one. We do not think so.

The complaint contained no averment that the land could not be sold in parcels without injury. No such issue was tendered by the complaint. Nor did the law of the case authorize such an issue to be presented and determined by the court. Section 633 of the code provides that, "in rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action." Where a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest, or installment of the principal, and there are other installments not due, the court is required to ascertain whether the property can be sold in parcels, for the purpose of determining the proper decree to be rendered in the case. 2 G. & H. 295, 296, secs. 637, 638, 639. But when the whole sum secured by the mortgage is due, no such question can be properly presented to the court. See *Harris v. Makepeace*, 18 Ind. 560; *Smith v. Pierce*. 15 Ind. 210; *Benton v. Wood*, 17 Ind. 260. If the land consists of separate parcels, it is the imperative duty of the sheriff, under the statute, to offer the parcels separately; and if it consists of a single tract or body, and is susceptible of division without injury, and the sale of the whole is not necessary to satisfy the execution, he is required to divide it, and to offer at one time only so much of it as may be necessary to satisfy the judgment, interest, and costs. We think the answers were bad. If the decree of foreclosure is a valid one, still, as the sale by the sheriff is void, the appellant has the right to redeem, and it is shown by the complaint that the sum tendered was sufficient to satisfy the judgment, interest, and costs.

Jaeger v. Stoebling.

Judgment reversed, with costs, and the cause remanded, with directions to the Circuit Court to sustain the demurrers to the answers, and with leave to both parties to amend their pleadings.

J. L. Ketcham, J. L. Mitchell, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

F. Rand, R. H. Hall, and A. Seidensticker, for appellees.

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JAEGER v. STOEBLING.

ATTACHMENT.—Bond for Release of Property.—Waiver.—Where property attached has been released from the custody of the officer, upon a bond executed to him for that purpose, and, afterwards, an execution in favor of a stranger to the attachment proceedings, issued after the levy of the attachment, is levied upon the attached property by the consent and direction of the attachment plaintiff, and such property is sold thereon by the officer, there can be no recovery on the bond.

APPEAL from the Marion Common Pleas.

FRAZER, J.—This was a suit on a bond to a sheriff to release property attached from the sheriff's custody. The answer was to the effect that a judgment was recovered by a third person against the plaintiff in this suit, upon which Richman, the principal in the bond sued on, became replevin bail; and that one Brinkmyer also recovered a judgment against Richman; that executions were duly issued on said judgments after the levy of the attachment; that said executions were, by the direction and consent of the plaintiff, levied upon the attached property, and it was sold by the sheriff, wherefore it could not be returned. A demurrer to this answer was overruled, and upon that arises the only question presented.

The answer shows that the plaintiff himself participated in the unauthorized act of the sheriff in seizing and selling

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the property by virtue of the executions, thus putting it out of the power of the obligors of the bond to comply with the condition of the instrument. The appellant questions the sufficiency of this answer, but furnishes us with neither reason nor authority upon which to base a judgment in his favor. A point thus attempted to be thrust upon us for decision, by way of mere experiment, may well be deemed to be waived. We think, however, that the answer was good.

The judgment is affirmed, with costs.

J. Milner, J. L. Ketcham, and J. L. Mitchell, for appellant.

A. G. Porter, B. Harrison, and W. P. Fishback, for appellee.

30	342
134	146
30	342
139	224
30	342
142	374
30	342
145	101

DARNELL v. ROWLAND.

FRAUD.—Pleading.—The general allegation of fraud is not of itself sufficient to raise such an issue. The facts—the acts and circumstances—which constitute the fraud must be alleged.

SAME.—Weakness of Mind.—If a party be *compos mentis*, mere weakness or feebleness of mind does not render him incapable of making a contract, but may become a controlling circumstance, when connected with other facts tending to establish fraud, in giving character to the transaction, and rendering it fraudulent; but to make a pleading good for that purpose, the *indicia* of fraud must be alleged.

EVIDENCE.—Unsoundness of Mind.—A witness testified that he had been acquainted with the plaintiff for several years, and said, “I think her mind was rather weak at the time of making the contract, but was improving. I did not think her mind was sufficient for me to contract with her.”

Held, that this did not prove that the plaintiff was of unsound mind.

APPEAL from the Owen Common Pleas.

ELLIOTT, J.—Suit by Sarah Rowland against Isaac M. Darnell. The complaint is in three paragraphs. The first paragraph is on a promissory note for fifty-five dollars and twenty-five cents, payable when Darnell should collect that

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amount of interest due on a note transferred by the plaintiff to him, and avers that he had collected said interest.

The second paragraph is upon the following agreement in writing, viz:—

“Memorandum of an agreement made and entered into between Isaac M. Darnell and Sarah Rowland, both of the county of Owen and State of Indiana, witnesseth: that the said Sarah Rowland agrees to, and has this day assigned over to Isaac M. Darnell cash notes on John Briggs, of the county of Sullivan and State aforesaid, to the amount of one thousand three hundred dollars, without recourse, the same being secured by mortgage as purchase money of real estate. And the said Isaac M. Darnell, on his part, agrees for and in consideration of the use of said money, to pay said Sarah, as long as she lives, one dollar for each week, and boarding, if she continues to live with his family, and also, in case of sickness, to take care of her, and see that she has proper medical attendance; and if she chooses to live with any one else, he is to pay her two dollars and fifty cents each week, in such payments, when due, as she may elect herself. And, furthermore, it is mutually agreed by and between the said parties, that at the end of the natural lifetime of the said Sarah Rowland, said Isaac M. Darnell, his executors or administrators, is to pay over the above assigned notes to Hannah R. Darnell and Jennie D. Darnell, equally dividing it between them. And, furthermore, in order to secure the performance of this contract on the part of the said I. M. Darnell, and to secure damages which may arise to the said Sarah Rowland on account of its forfeiture, said I. M. Darnell is to give a lawful mortgage on the south half of the south-east quarter of section 17, town 9, north of range 4 west, or any other property of equal or greater value.

“Witness our hands and seals, this December 19th, 1865.

“SARAH ROWLAND, [Seal.]

“ISAAC M. DARNELL, [Seal].”

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It is averred, that after making said contract, the plaintiff lived in the family of the defendant fifty-nine weeks, and had made her home elsewhere for the period of twenty weeks. The payment of forty-seven dollars is admitted, and judgment demanded for the residue, according to the terms of the contract.

The third paragraph alleges, that previous to the month of November, 1867 [1865], the plaintiff was a resident of Sullivan county, Indiana, and possessed in her own right a competence sufficient for her support; that having about that time disposed of her farm, with the intention of investing the proceeds in a manner that would secure the comfort of her declining years, the defendant at that time sought her out, and induced her to pay a visit to his family; that being unmarried and childless, and of advanced years and feeble health, she availed herself of the defendant's invitation to visit her sister, the defendant's wife; that soon after her arrival in the defendant's family she was taken seriously ill, and for some weeks suffered the inroads of disease; that during said sickness the defendant, his wife, and family, attended her with the most assiduous attention, and by their kind and flattering treatment sought in every way to win her confidence and esteem; that after her confidence had thus been wrought upon, and her body and mind so enfeebled by disease as to render her incapable of properly transacting her business, the defendant fraudulently induced her to enter into the contract herein before set out in connection with the second paragraph of the complaint. It is further averred that soon after the execution of the contract, and the notes therein referred to were surrendered to the defendant, "the deportment of himself and family towards the plaintiff became so harsh and disagreeable as to render her stay among them exceedingly unpleasant to her, and she was subject to such constant annoyance and insult as to entirely rob her of all the comforts of home, which the representations of the defendant induced her to believe she was contracting for, and to

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obtain which she made said contract;" that by reason of said unkind treatment she was compelled to remove from the defendant's family, and find a home elsewhere, which she did on the — day of —, 1867; that the defendant had failed to pay all that was due her under said contract, and had also failed to execute and deliver to her the mortgage as required by said contract. It prays that the contract be declared void, and for judgment for "said one thousand three hundred dollars, and interest thereon, and for other proper relief." A demurrer to this paragraph was overruled, to which an exception was taken.

Issues were formed on the first and second paragraphs of the complaint, but no question arises on them in this court.

To the third paragraph the defendant answered: First, the general denial.

Second, that on the 14th of January, 1867, and before the commencement of this suit, the defendant executed and tendered to the plaintiff a mortgage on the property described in the agreement. The mortgage was filed with and made a part of the answer. Its condition is in strict conformity with the agreement. The paragraph further avers a performance of all the other stipulations of the agreement on the defendant's part, and denies all fraud. The third paragraph alleges a performance of all the stipulations of the agreement on the part of the defendant. Reply in denial. The issues were tried by a jury, who returned the following verdict: "We the jury find that there is due and unpaid upon the note in the first paragraph \$37.84; that the money due per week on contract in second paragraph of complaint was not demanded by plaintiff of defendant; that there is due plaintiff for money due her per week on the contract at date of suit \$—; that the contract was not procured from the plaintiff through fraud; that the plaintiff at the date of contract was not capable of contracting. We the jury find for the plaintiff, and assess her damages at thirteen hundred and thirty-seven dollars and eighty-four cents, and that the contract named in complaint

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be canceled and rescinded." A motion for a new trial was overruled, and judgment rendered on the verdict.

The first error complained of is the action of the court in overruling the demurrer to the third paragraph of the complaint. That paragraph, as we have seen, claims that the contract between the parties was procured by fraud, and that the plaintiff at the time of its execution was so enfeebled by disease, both in body and mind, as to render her incapable of properly transacting her business; and for these reasons it is claimed that the contract should be held void, or rescinded, and a judgment is claimed for the amount of the notes assigned by the plaintiff to the defendant. Upon this paragraph the recovery was had.

The general allegation of fraud is not, of itself, sufficient to raise such an issue. The facts, the acts and circumstances, which constitute the fraud must be alleged. This the paragraph under consideration does not do, and it is not therefore sufficient to raise the question of fraud. But as the jury found that the contract was not procured by fraud, we need not discuss that question further. Nor is it alleged that, at the time of making the contract, the plaintiff was of "unsound mind," and therefore incapable of contracting. The only allegation in the paragraph on the subject is, that "her body and mind were so enfeebled by disease as to render her incapable of properly transacting her business;" and that whilst in this condition the defendant fraudulently induced her to enter into the contract. We have already disposed of the allegation of fraud, and refer here only to the question of unsoundness of mind. Mere weakness or "imbecility of mind is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting with discretion in the ordinary affairs of life. This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos*

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mentis, the mere weakness of his mental powers does not incapacitate him." 2 Kent Com. 452; *Somers v. Pumphrey*, 24 Ind. 231.

Weakness or feebleness of mind may become a controlling circumstance, when connected with other facts tending to establish fraud, in giving character to the transaction, and rendering it fraudulent; but to render a pleading good for that purpose, the *indicia* of fraud must be alleged. We do not think the paragraph shows any valid reason for setting aside or canceling the contract. The demurrer to it should have been sustained.

Nor does the evidence support an allegation of unsoundness of mind on the part of the plaintiff at the time of making the contract. It appears by her own evidence that she was not sick at the defendant's house, as alleged, before the contract was made: she says, "I was not sick, but had some cough;" nor does she pretend that she did not fully understand the contract, or its legal effect, or that she was in any manner overreached or unduly influenced in making it; she only complains of the defendant's family after it was made. Several witnesses testify to her soundness of mind at the date of the contract, whilst the only evidence even remotely tending to the contrary is that of one Minnick, a brother-in-law, who testified that he had been acquainted with the plaintiff for several years, and then said, "I think her mind was rather weak at the time of making the contract, but was improving. I did not think her mind was sufficient for me to contract with her." This does not prove that she was of unsound mind. The verdict was clearly contrary to the evidence, and should have been set aside and a new trial granted.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the third paragraph of the complaint, and for further proceedings, &c.

A. T. Rose, for appellant.

J. T. Dye and A. C. Harris, for appellee.

Routh and Others v. Spencer and Another.

ROUTH and Others v. SPENCER and Another.

PROCEEDING SUPPLEMENTARY TO EXECUTION.—*Pleading*.—In a proceeding supplementary to execution, an answer or a cross-complaint not sworn to should be rejected on motion.

SUPREME COURT.—*Abstracts*.—This court refused to pass upon the question of the exclusion of evidence where the abstract required by rule ten of the Supreme Court failed to show what the evidence was or that it was in any way material.

APPEAL from the Wayne Common Pleas.

GREGORY, J.—This was a proceeding supplementary to execution, commenced by the appellees against the appellants, Routh, Routh, Canady, and Julian, the object of which was to reach the amount of two notes executed by Canady to Jeremiah T. B. Routh, against whom the appellees had a judgment, the notes being in the hands of Julian, as attorney for Routh.

Canady and Julian answered, admitting the indebtedness, and the possession in the latter of the notes.

One Sanford, who was not a party, but who asked to be made such, joined in a cross-complaint with the administrator of Joseph Routh (who was a party), in which Sanford set up an equitable interest in a part of the amount secured by the notes, arising under an agreement between the payee and the administrator, executed before the commencement of this proceeding. On the motion of the appellees this cross-complaint was rejected. This was right, if for no other reason, because it was not sworn to. See *Coffin v. McClure*, 23 Ind. 856.

The court below, on the motion of the appellees, rejected the answer of the appellants setting up the same matter set forth in the cross-complaint. This answer was not sworn to by either Canady, Jeremiah T. B. Routh, or Julian. There was no error in this action of the court.

The court excluded certain testimony offered by the appellants on the trial, but the abstract fails to show what

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the evidence was, or that it was in any way material. This court under rule ten will not pass upon the question. The motion for a new trial was properly overruled.

The judgment is affirmed, with costs.

J. B. & J. F. Julian, for appellants.

C. H. Burchenal, for appellees.

CHAMBERS and Wife v. NICHOLSON.

PRACTICE.—*Foreclosure.*—*Parties.*—In the foreclosure of a mortgage executed by husband and wife, the wife is a proper party defendant.

PLEADING.—*Discontinuance.*—Suit to foreclose a mortgage. Answer, the general denial, and a paragraph professing to answer the whole complaint, alleging payment of a part of the debt secured by the mortgage. Reply of denial to this paragraph. Motion by defendant to discontinue the action because the reply had made an issue upon the defective answer.

Held, that this motion was properly overruled.

APPEAL from the Knox Common Pleas.

FRAZER, J.—This was a suit by the appellee against the appellants (husband and wife), to foreclose a mortgage executed by both.

A motion to strike out the name of the wife as a defendant was correctly overruled. Surely this question needs no discussion. There was a general denial, and a paragraph of answer to the whole complaint, alleging payment of a part of the debt secured by the mortgage, and a reply thereto of denial, and thereupon a motion by the appellants to discontinue the action because the reply had made an issue upon the defective answer; which motion was overruled, and this is assigned for error. The point is too sharp even for the common law system of pleading, and is not supported by the authority (1 Chit. Pl. 523) cited to sustain it. Where the plea professed to answer only a part, and did no more, and the remainder was unanswered, regu-

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larity required that the plaintiff should take judgment as by *nil dicit* for the part unanswered, before replying. But that rule could not have applied in this case, for here the whole complaint was answered by the general denial.

A motion for a new trial was overruled, and this, it is claimed, was error. It is claimed that the evidence was not sufficient to sustain the verdict. The particular point urged is, that an assignment of an auditor's certificate of the sale of school lands was insufficient. The particular defect in the assignment is not, however, mentioned in the argument, and we confess our failure to discover it.

The judgment is affirmed, with ten per cent. damages, and costs.

J. C. Denny and G. G. Reily, for appellants.

W. B. Robinson, J. M. Boyle, and F. W. Viehe, for appellee.

THE STATE v. PRYOR.

CRIMINAL LAW.—*Obtaining Signature by False Pretenses.*—An indictment for obtaining by false pretenses the signature of a person to a promissory note payable in bank to the order of the defendant, for the purpose of raising money thereon for the sole benefit of the defendant, without consideration, being accommodation paper, was held good.

Held, also, that the offense was complete when the signature was obtained, by false pretenses, with intent to cheat or defraud another, and that it was not essential to the offense that actual loss or injury should have been sustained.

SAME.—The indictment charged, with proper qualifying averments, that the defendant stated that his indebtedness was but \$2,000, when he knew it to be \$12,000; and that his property was unencumbered by debts, when, as he well knew, it was under executions and judgments to the amount of \$6,000. *Held*, that these were representations of material facts, and sufficient.

APPEAL from the Cass Circuit Court.

RAY, C. J.—Indictment charging that the appellee did, at, &c., on, &c., unlawfully, feloniously, designedly, and with

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intent to defraud one Robert Belew of his goods, chattels, money, and property, obtain the signature of the said Belew to a certain written instrument, to wit, to a promissory note for the sum of two hundred dollars, payable three months after date, at the Logansport National Bank, to the order of the said Richard Pryor, under the name and style of R. Pryor, dated December 10th, 1867, for the purpose of raising money on the same, for the sole benefit of him, the said Richard Pryor, the said note being so obtained from the said Robert Belew wholly without consideration, and being what is commonly called accommodation paper, by then and there unlawfully, feloniously, knowingly, falsely, and designedly pretending and representing to him the said Robert Belew, that he, said Richard Pryor, was then and there solvent; that the goods, wares, and merchandise which he, the said Richard Pryor, then and there had in his store at Logansport, State of Indiana, would more than pay off all his indebtedness, and that his, said Pryor's, property, was free and unincumbered; that he, said Pryor, was then and there the owner of a certain mortgage for the sum of two thousand dollars, which would pay off all of his indebtedness a second time; that he, said Pryor, had his life insured for two thousand dollars, which sum, in the event of said Pryor's death, would pay off all of said Pryor's indebtedness a third time; that he, said Richard Pryor, did not then and there owe debts to exceed the sum of two thousand dollars, and that he, said Pryor, owned property to exceed that sum, to wit, two thousand dollars, free and unincumbered by debts. It is averred that said Robert Belew believed the said false pretenses and representations so made, and being deceived thereby, was, by reason of said representations and pretenses, induced to sign said note, and upon no other consideration whatever; and that said Pryor did then and there obtain and receive the said Belew's signature as aforesaid, feloniously and designedly, by means of the said false representations and pretenses, with intent feloniously to cheat

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and defraud the said Belew of his goods, &c. The indictment then denies the truth of all the representations made, charging that said Pryor was then, and well knew himself to be, indebted in the sum of twelve thousand dollars, and that in fact, as he well knew, his property was encumbered by judgments and executions in the sum of six thousand dollars.

A motion to quash the indictment was sustained. From this ruling of the Circuit Court the State appeals.

The 27th section of the act defining felonies (2 G. & H. 445) provides that, "if any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value; such person shall, upon conviction thereof, be imprisoned," &c.

Under a statute to the same effect in New York, it was held that the offense is complete when the signature is obtained by false pretenses, with intent to cheat or defraud another, and that it is not essential to the offense that actual loss or injury should be sustained. In that case the distinction is taken between the case of *The People v. Stone*, 9 Wend. 190, under a former act of the legislature, and the case then under consideration, which was governed by a statute like our own. In the case of *The People v. Stone*, the offense charged was the obtaining an indorsement upon several notes by false pretenses, and a doubt was expressed whether a note thus obtained, where no use was made of it, would be considered either money, goods, or chattels, or a valuable thing; but it was held that the later statute rendered the offense complete when the signature was obtained. *The People v. Genung*, 11 Wend. 18.

In the case of *The People v. Galloway*, 17 Wend. 540, it was held that the instrument to which the signature was obtained must be of such a character as that it may work a

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prejudice to the property of the person affixing the signature, or of some other person.

The same court, in ruling upon the same statute in *The People v. Crissie*, 4 Denio, 525, determined that it need only appear that the instrument, on its face, is one calculated to prejudice the party who has signed it, though on the facts stated in the indictment it would be void for fraud.

These cases fully sustain the view we take of the statute. The note in this case was negotiable so as to protect an innocent holder, and even the fraud practiced in obtaining the signature of Belew would not have protected him from the liability. The indictment also charges the intent to have been to raise money upon the note. The representations are of facts, not promises; and all estimates of values placed by appellee upon his goods may be disregarded, and still the material facts remain:—the statement of his indebtedness at but two thousand dollars, when he knew it to be twelve thousand dollars; that his property was unencumbered by debts, when it was under executions and judgments to the amount of six thousand dollars, as he well knew. The statements were made of facts which must have been within the knowledge of the appellee, and which the person who was thereby deceived had a right, as a prudent man, to rely on and accept as true and act upon.

We are of opinion that the motion to quash should have been overruled. The judgment is reversed, and the cause remanded for further proceedings.

D. E. Williamson, Attorney General, for the State.

F. Swigart and J. M. Pratt, for appellee.

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BLEDSOE v. RADER.

PRACTICE.—*Supreme Court.—Sufficiency of Answer.*—In order that the insufficiency of an answer as a valid defense may be assigned for error in the Supreme Court, there should be in the court below a demurrer to the answer, or a motion for judgment upon the pleadings notwithstanding the verdict for the defendant, under section 372 of the code.

PLEADING.—*Cross-Complaint.*—Answer, in which all the material facts stated went simply in bar of the action, and the relief prayed amounted to nothing more than would be the legal effect of a judgment for the defendant.

Held, that this could not be regarded as a cross-complaint.

CONTRACT.—*Rescission of.*—Suit by mortgagee against mortgagor to foreclose a mortgage of real estate for purchase money. Answer, setting up an agreement between the plaintiff and defendant to rescind the sale—that the latter should reconvey the mortgaged property, and the former surrender the notes given for purchase money—and to submit all other matters in controversy between them to arbitration; and alleging the tender of a deed by the defendant to the plaintiff in pursuance of said agreement.

Held, that if the facts proved on the trial showed, in contemplation of law, a delivery, instead of a tender of the deed, this fact could not aid the plaintiff or weaken the defendant's defense.

Held, also, that a failure of the arbitration, especially without the fault of either party, could not affect the agreement to rescind, or deprive either of the parties of the right, by a proper suit, to compel a settlement of the accounts between them growing out of the rescission.

APPEAL from the Montgomery Circuit Court.

ELLIOTT, J.—Suit to foreclose a mortgage. The facts alleged in the complaint are, that Bledsoe, the appellant, sold to Rader, the appellee, one hundred and twenty acres of land in Montgomery county, in this State, for which Rader assigned to him a claim for one thousand eight hundred dollars on Mills and Bryan for the rent of the Oaklan mills in Clark county, payable one hundred dollars monthly, and also executed to Bledsoe his four several promissory notes, as follows: one for seven hundred dollars, payable January 1st, 1865; one for seven hundred dollars payable January 1st, 1866; one for six hundred dollars payable January 1st, 1867; one for six hundred dollars payable January 1st, 1868. And to secure the payments on the lease, and

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also said several promissory notes, Rader executed to Bledsoe the mortgage in suit.

The notes and mortgage were executed on the 29th of November, 1860; and this suit was commenced on the 13th of February, 1864, and before either of the notes was due. The complaint alleges the non-payment of the money due on the lease, and that the notes remain unpaid.

Rader filed a special answer setting up new matter in avoidance and as a bar to the action, on which an issue was formed and submitted to the court for trial, without a jury. The court found for the defendant, overruled a motion for a new trial, and rendered judgment on the finding.

It is urged by the appellant that the facts alleged in the answer do not constitute a bar to the action; and that the finding and judgment, therefore, should have been for the plaintiff.

The answer alleges, that on the 23d day of March, 1863, the plaintiff and defendant entered into the following written agreement in reference to said notes, mortgage, &c., viz:

"George R. Rader and Lewis S. Bledsoe, in order to settle all matters in controversy between them, make the following agreement: Said Rader is to convey a certain lot of land in Montgomery county, Indiana, containing one hundred and twenty acres, to Bledsoe, and said Bledsoe, as a concurrent act, is to surrender to said Rader all notes for deferred payments thereon, and surrender to said Rader a lease on Mills and Bryan; and the foregoing agreement is the inducement for the following submission of all other matters in controversy between said parties. The items of controversy are to be furnished by the parties within thirty days, and when so furnished are to enter into and become a part of this agreement. And the said Bledsoe hereby selects Robert M. Kelly as an arbitrator, and said Rader hereby selects S. Stansifer as arbitrator, and in case the two disagree, they may call in an umpire, and the parties hereby agree to abide and faithfully perform the award or umpirage; and the same shall be made a rule of the Jackson Circuit

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Court. And the parties further agree to enter into further bonds with surety in the penalty of one thousand dollars each, conditioned as aforesaid, by the 1st day of April, when the conveyance is to be made, which is to be a special warranty against incumbrances since the same was conveyed to said Rader, and said lease and notes are then to be surrendered.

G. R. RADER.
S. S. BLEDSOE.

March 23d, 1863."

It is averred in the answer that the defendant has kept and performed all his covenants in said agreement; that at the time of making the agreement he surrendered the possession of the mortgaged premises to the plaintiff, who then and there took possession thereof, and has ever since quietly and peaceably held the same, and received the rents and profits thereof; that on the 24th day of April, 1863, he executed and tendered to the plaintiff a deed of conveyance according to said agreement; but the plaintiff refused to receive the deed and surrender said lease and notes, and that he brought the deed into court for the plaintiff; that in order to carry out said agreement as to the arbitration, he executed an arbitration bond in the penalty of one thousand dollars, with one Cooper as his surety, conditioned as required by said agreement. Prayer for judgment, and that the plaintiff may be compelled to receive the deed and surrender up the lease and notes, and for general relief.

No demurrer was filed to the answer, nor was there a motion by the appellant for a judgment upon the pleadings notwithstanding the finding for the defendant, under section 372 of the code. The question therefore of the sufficiency of the answer as a valid defense is not properly before us. But it is insisted that the answer is, in fact, a cross-complaint, and that an objection to a bad complaint may be assigned for error in this court, though the objection was not taken by demurrer in the court below. We cannot regard this pleading as a cross-complaint. No material fact is stated in it that does not go simply in bar of the

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action. True, it prays that the plaintiff may be compelled to accept the deed and surrender the notes. The deed was brought into court for the defendant; this was necessary as a part of the defense; and a judgment for the defendant, upon the final trial on the merits, would bar any subsequent suit on the notes; and the prayer that they be surrendered amounts to nothing more than would be the legal effect of a judgment for the defendant.

The refusal of the court to grant a new trial is assigned for error. One of the reasons urged for a new trial is, that the finding of the court is contrary to the evidence. This point is urged here. One objection taken to the sufficiency of the evidence is, that it does not prove a tender of the deed by Rader to the plaintiff, as alleged in the answer, but that it shows an actual delivery thereof. The evidence shows that the parties agreed that Rader should execute the deed and leave it at the office of Mr. Stansifer for Bledsoe, which he did, and Stansifer testifies that he told Bledsoe the deed was there for him, but that he never made an actual tender or delivery of it to Bledsoe. It is not necessary that we should discuss the question whether these facts do or do not show a delivery of the deed in contemplation of law. Rader treats them as showing a tender, but if they amount to a delivery, the fact cannot aid Bledsoe, or weaken Rader's defense.

The arbitration provided for in the agreement was never had; and it is claimed by the appellant that this, of itself, must defeat the defense of Rader, and should reverse the judgment. It appears from the evidence that both parties in good faith executed the bonds required by the agreement, and were both ready, willing, and anxious, to enter into the arbitration. Several times were mutually agreed upon for that purpose, at which the parties met; but in every instance the arbitration failed in consequence of the absence or failure to serve of one or the other of the arbitrators. These efforts continued even after this suit was instituted. Other arbitrators were agreed upon, but with no better success. The

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failure, therefore, is not attributable to any fault of either of the parties.

There is no averment in the answer that the arbitration was held or an award ever made. Nor was such an averment necessary under the agreement set up in the answer, as we understand it.

By the agreement Rader was to reconvey the land to Bledsoe, and the latter agreed to surrender the lease and the notes given for the land to Rader; and it appears that it was the intention of the parties to rescind the original contract of sale. A rescission of the contract would necessarily imply, in the absence of any special agreement as to the terms of rescission, that the parties should be placed *in statu quo*. Rader had received the rents and profits of the land for over two years, for which he would be liable to account; and it is shown by the evidence that Bledsoe had received something on the rent of the mill referred to in the mortgage, which he would be required to refund to Rader. The mill, it seems, was destroyed by fire a short time after the sale of the land, and hence a failure to pay the subsequent rents by the lessees; and we learn from the evidence that the adjustment of the accounts between the parties growing out of the original contract and its subsequent rescission, formed the principal, if not the only matter of difference between them, which was intended to be submitted to arbitration. The failure of the arbitration, and especially without the fault of either of the parties, could not affect the agreement to rescind the contract; nor does it deprive either of the parties of the right, by a proper suit, to compel a settlement of the accounts between them, growing out of the rescission.

We find nothing in the case to justify a reversal of the judgment.

The judgment is affirmed, with costs.

J. McCabe, for appellant.

J. M. Butler and *S. C. Willson*, for appellee.

The Board of Commissioners of Bartholomew County v. Boynton and Another.

**THE BOARD OF COMMISSIONERS OF BARTHOLOMEW COUNTY v.
BOYNTON and Another.**

Poor.—*Physicians for.*—The authority of the board of county commissioners under sec. 8, 1 G. & H. 64, to contract with physicians to attend upon the poor generally in the county includes the power to make the contract with one only, if the board, in the exercise of a reasonable discretion, shall deem this sufficient.

SAME.—If sufficient provision has been made by the board of commissioners, a township trustee has no authority to employ medical or surgical services for paupers within his township.

APPEAL from the Bartholomew Circuit Court.

RAY, C. J.—Action against the Board of Commissioners for services rendered to a pauper. The averments are as follows:—“Alonzo G. Boynton and Dubois Hawley, partners as Boynton & Hawley, complain of the Board of Commissioners of Bartholomew county and say, the defendant is indebted to plaintiffs in the sum of thirty-eight dollars for medical services rendered to one Samuel P. Taggart, a pauper of Sand Creek township in said county, on the order of John Newson, Trustee of said township, a bill of particulars of which is filed herewith. Plaintiffs aver that during all the time of the rendition of said services said defendant had not contracted with physicians to attend upon the poor generally in said county, and had not contracted with a physician to attend upon the poor of said township. Plaintiffs demand payment for \$38.00.”

The appellant filed a demurrer to the complaint for the reason it does not state facts sufficient to constitute a cause of action, which being submitted to the court was overruled, to which the appellant excepted at the time.

There is nothing in the demurrer. The trustee was authorized to contract, where no provision was made for the poor of his township. *Proviso* to sec. 8, p. 64, 1 G. & H. An answer was filed, as follows:—

“The defendant for answer to the plaintiff's complaint says: that at the time of said pretended service to said Samuel

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P. Taggart, as set forth in said complaint, he was an inhabitant and resident of Sand Creek township in said county of Bartholomew; that at the time said medical service was rendered, and at the time of the plaintiffs' employment therefor, there was a poor-house of said county, duly constructed and provided with a superintendent therefor employed by said county, for the reception and care of all the poor of said Bartholomew county; that at said time Doctor John B. Groves, who is a skillful physician, having a knowledge of surgery, was the physician of said poor-asylum, and of the jail of said county, with whom the defendant, on the — day of March, 1867, had entered into a contract to attend upon and render all medical and surgical aid to all persons confined in the jail of said county and paupers in said county asylum, from said date, for the time of one year, for a consideration paid to him by defendant; that said Groves at said time of said pretended service rendered by plaintiffs, and of their said employment therefor by the said trustee, was at all times ready and willing to do and perform any and all duty within his said employment, of which plaintiffs and said trustee of Sand Creek township well knew; that at the time of the employment of plaintiffs by said trustee and the rendition of said medical services by them, Doctor Solomon Davis, who is a resident of Bartholomew county, and who is a competent and skillful physician, having a knowledge of surgery, was the physician of said county to attend upon and render all necessary medical and surgical aid to the poor generally therein outside of the poor-asylum and county jail; that on the — day of —, 1867, the defendant made and entered into a contract with said Davis wherein he agreed and was required by said contract for a consideration paid by defendant, to attend upon and to give and render all necessary medical and surgical aid and assistance to all the poor generally of Bartholomew, in each and every township of said county outside of the jail and asylum thereof, for the time of one year from said date, and gave bond to the defend-

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ant for the honest and faithful performance of his duties under said contract as aforesaid, with good and sufficient surety to the approval of defendant; that at the time of said pretended employment of plaintiffs by said trustee, and the rendition of said medical aid and service by them, said Doctor Davis was the physician of said county, as aforesaid, and was willing to attend upon and render and give all necessary medical and surgical aid and assistance to any and all the poor generally of said county in each and every township thereof; and especially was he ready and willing and able to attend upon and give and render to said Samuel P. Taggart, the party on whom said plaintiffs attended, all necessary medical aid, as required by his said contract with defendants, if he had been notified that his services as physician as aforesaid were required; of all which plaintiffs and said trustee well knew; that in said case said Davis had no notice, and his services were at no time required; that Doctor Davis resides at Columbus, the county seat of said county, and easily accessible to any portion thereof; and one physician is able to attend upon all the poor of said county outside of the poor-house and county jail; and especially has said Davis at all times been ready and willing, able and sufficient for said purpose for which he was employed; and defendant demands judgment."

Appellees filed a demurrer to the answer for the cause that the same does not state facts sufficient to constitute a defense to the action, which being submitted to the court was sustained, to which appellant excepted at the time; and appellant abiding by the answer and refusing to answer further, judgment was entered against appellant for the amount of appellees' claim.

Section 8, 1 G. & H. 64, is as follows: "It is hereby specially made the duty of such board to contract with one or more skillful physicians, having knowledge of surgery, to attend upon all prisoners confined in jail, or paupers in the county asylum, and may also contract with physicians to attend upon the poor generally in the county, and no

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claim of a physician or surgeon for such services shall be allowed by such board, except in pursuance of the terms of such contract; provided that the foregoing section shall not be so construed as to prevent the overseers of the poor, or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his or their jurisdiction may require."

The authority to contract with physicians certainly includes the power to make the contract with one, if the board shall, in the exercise of a reasonable discretion, deem that contract sufficient. The answer avers that in this case it was ample; and as the trustee is only authorized to employ in the event the commissioners fail to do so, and such failure is here denied, the answer shows a want of power to make the employment. It is of course impossible for us to judge of the wants of the county in this matter, and as an issue was tendered, the proper place to try that issue as a matter of fact and not of law, was the court below. The demurrer should have been overruled.

The judgment is reversed, with costs.

F. T. Hord, for appellant.

R. Hill and G. W. Richardson, for appellees.

CUNNINGHAM *v.* MITCHELL.

HUSBAND AND WIFE.—*Wife's Separate Property.—Agency of Husband.*—A married woman owned in fee, as her separate property, land occupied as a farm by herself and husband, and used and cultivated by the latter, who, with his wife's knowledge and assent, used, sold, and marketed the annual products as his own, and used the proceeds in the support of the family. With her assent, he rented a field to be planted in corn, furnishing the team, plows, and seed corn to the tenant, who was to have one-third of the crop. The husband sold two-thirds of the growing crop in payment of an account

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for medical services rendered by the purchaser to the husband and family. Afterwards, and before the corn was ripe, the wife obtained a divorce. *Held*, in a suit by the wife against the purchaser for entering the close and gathering and carrying away the ripened corn, that the sale was valid, and was not affected by the subsequent divorce.

APPEAL from the Harrison Circuit Court.

ELLIOTT, J.—Suit by Sarah J. Cunningham, the appellant, against Charles G. Mitchell, before a justice of the peace, for unlawfully entering the close of the plaintiff and gathering and carrying away therefrom a quantity of corn.

The appellant recovered before the justice. Mitchell appealed to the Circuit Court, where there was a finding for him. Motion for a new trial overruled, and judgment.

The only question here is, did the evidence sustain the finding?

It appears from the evidence that the appellant was the owner in fee, and as her separate property under the statute, of the land on which the corn in controversy was standing; that she and her husband, Robert Cunningham, lived on the land in 1867, and for a number of years prior thereto; that Robert owned a team, &c., and during all the time they so lived on the land had used and cultivated the same, and, with the knowledge and assent of his wife, used, sold, and marketed the annual products of the land as his own, and used the proceeds in the support of the family. In the spring of 1867, Robert, the husband, with the assent of his wife, rented a field on the farm to his son by a previous marriage. Robert furnished the team, plows and seed corn; and his son tended the field, and was to have one-third of the corn. Robert was indebted to the defendant, Mitchell, for medical services rendered himself and the family, and in July, 1867, he sold two-thirds of the growing crop to Mitchell in payment of said medical bill. In September following, and before the corn was ripe, the appellant was divorced from her said husband; and in November following, Mitchell, claiming under the purchase

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from the husband, gathered and carried away the corn for which the suit was brought.

It thus appears that the husband, in the management of the farm for their common benefit, was the clearly recognized agent of his wife, with power to sell and dispose of the crops at pleasure, and for his own purposes, which power had not been countermanded, and hence still existed at the time of the sale of the corn to Mitchell; and the sale being a valid one at the time it was made, was not affected by the subsequent divorce of the appellant from her husband.

We are therefore of opinion that the finding and judgment of the Circuit Court are clearly sustained by the evidence, and that the judgment should be affirmed.

The judgment is affirmed, with costs.

W. A. Porter, for appellant.

S. K. Wolfe and *J. W. Nichol*, for appellee.

RUSTON and Others v. GRIMWOOD.

LOCATION OF HIGHWAYS.—*Supervisor.*—*Trespass.*—Trespass for entering the enclosed land of the plaintiff and removing fences. Answer, justifying the entry and the removal of the fences under an order of the board of county commissioners locating and establishing a township road.

Held, that the answer was bad for failing to aver that the supervisor gave the occupant of the land sixty days notice in writing to remove his fence.

SAME.—*Order of Location.*—*Description of Highway.*—In a proceeding for the location of a highway, the final order of the board of commissioners was as follows: "And the board, having duly examined and considered said report, accept and approve the same, and it is now here ordered that *said road* be, and the same is hereby located to the width of twenty-five feet." The beginning, terminus, course, and distance of the road were described in the petition.

Held, that the order was sufficiently definite.

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NEW TRIAL.—*Excessive Damages.*—The Supreme Court will not consider the question of excessive damages if it be not embraced in a motion for a new trial.

APPEAL from the Vanderburgh Common Pleas.

GREGORY, J.—Suit by the appellee against the appellants for trespass for entering the enclosed land of the plaintiff and removing fences.

The defendant answered in two paragraphs. The second paragraph is the general denial. The first paragraph justified the entry and removing the fences under an order of the Board of Commissioners of Vanderburgh county, made at their December term, 1866, locating and establishing a township road.

A demurrer was sustained to this paragraph, and that is complained of as the first alleged error.

This paragraph is bad, because it fails to aver that the supervisor gave the occupant of the land sixty days notice in writing to remove his fence. See 1 G. & H. 365, sec. 41.

It is claimed, that the final order establishing the road is void for uncertainty. The petition states the beginning, terminus, course, and distance of the road. The order is as follows: “And the board, having duly examined and considered said report, accept and approve the same, and it is now here ordered that said road be, and the same is hereby located to the width of twenty-five feet.”

We hold that the order is sufficiently definite. The petition, remonstrance, and report of the reviewers are a part of the record, as well as the final order, and taken together there can be no difficulty in determining the location of the road.

It is urged that the damages are excessive, but this question was not embraced in the motion for a new trial, and therefore cannot be considered here.

The judgment is affirmed, with costs.

J. M. Shackelford and R. A. Hill, for appellants.

A. Iglehart and C. Denby for appellee.

The Jeffersonville, Madison, and Indianapolis Railroad Co. v. Chenoweth.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD COMPANY *v.* CHENOWETH.

RAILROADS.—*Injury to Animals.*—*Pleading.*—Suit against a railroad company for the value of stock killed on the track of the defendant by a passing train, the complaint averring, “that at the time and place when and where said stock was so run over and killed as aforesaid, the said railroad was not securely fenced as required by law.”

Held, that this averment sufficiently implied that the road was not securely fenced where the animals entered upon it.

Held, also, that the words, “not securely fenced as required by law,” alleged a fact, and not a conclusion of law.

APPEAL from the Morgan Common Pleas.

The appellee sued the appellant in the Johnson Common Pleas for the value of stock killed on the track of the appellant at different times by passing trains. Various paragraphs of the complaint charging the defendant with negligence were dismissed.

The other paragraphs alleged the killing &c., and each averred, “that at the time and place when and where said stock was so run over and killed as aforesaid, the said railroad was not securely fenced as required by law.”

Demurrers to these paragraphs, on the ground that they did not state facts sufficient, were overruled, and the defendant excepted.

Issues were formed, and the venue having been changed on the defendant’s motion to the Morgan Common Pleas, the cause was there tried by a jury. Verdict for the plaintiff, and judgment thereon. The rulings on the demurrers to the complaint are assigned as error.

FRAZER, J.—The complaint in this case has the same defect that was urged in *The I. & C. R. R. Co. v. Adkins*, 23 Ind. 340. In that case the averment was held equivalent to, or at least implying, that the road was not securely fenced where the animals entered upon the railroad. I am free to admit that this was a very liberal construction of a pleading when attacked by demurrer, and if the question

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were now here for the first time I should not so hold. I do not think that such looseness in pleading should be generally sustained. But that case has not been overruled, as the counsel for the appellant seem to suppose; and the majority of the court is not prepared to overrule it, deeming it correct.

There is nothing in the suggestion, that the words of the complaint, "not securely fenced as required by law," allege only a conclusion of law. They aver the fact that the road was not securely fenced, and the subsequent words neither enhance nor diminish the force of the fact stated.

The judgment is affirmed, with ten per cent. damages and costs.

G. M. Overstreet and A. B. Hunter, for appellant.

S. P. Oyler and D. W. Howe, for appellee.

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NEW TRIAL.—*Misconduct of Jury.*—That the finding of a jury should be reached without its members being exposed to improper influences is essential, in order to give any value to the verdict; and where, by reason of an irregularity on the part of the jury there can be no certainty that the verdict has not been improperly influenced, there should be a new trial.

SAME.—*Separation of Jury.*—Where the jury had retired to consider of their verdict, and, without the consent of the defendant or the permission of the court, about eleven o'clock at night, they agreed to return as a finding, that they agreed to disagree, and sealed up the same and disbanded (having informed the bailiff that they had agreed upon a finding and sealed it up, and the bailiff, acting in good faith, having permitted them to go to their homes); and they did not meet again until the hour of eight the next morning, when they destroyed the finding agreed upon, and brought into court a general and special verdict against the defendant;

Held, that a motion for a new trial by the defendant, assigning this misconduct of the jury for cause, should have been sustained.

APPEAL from the Lawrence Circuit Court.

RAY, C. J.—The appellee, plaintiff below, obtained a ver-

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dict and, over a motion for a new trial, judgment was rendered in his favor. One of the grounds for a new trial was alleged misconduct on the part of the jury.

An affidavit was filed in support of the motion, by the appellant, stating that after the jury had retired to consider of their verdict, without the consent of the appellant or the permission of the court, about the hour of eleven o'clock at night they agreed to return as a finding, that they agreed to disagree, and they sealed up the same and disbanded, and did not meet again until the hour of eight o'clock the next morning, when they destroyed the finding agreed upon and brought into court a general and special verdict against the appellant.

The affidavit of the bailiff is also filed, stating that the jury informed him they had agreed upon a finding, and sealed the same up, and that, acting in good faith, he permitted them to return to their homes; that next morning two of the jurors called upon him at an early hour and demanded the key of the jury room, which he gave them, and about eight o'clock the jury reassembled, and at their request he furnished them with another envelope, which last envelope contained the verdict returned into court; and that from the statements of two of the jury, made to him while still separate, and the facts above stated, he believes the finding returned into court is not the same in effect as the one agreed upon before the jury disbanded. There is also another affidavit stating the admission of a juryman that a new verdict was agreed upon in the morning and returned into court.

In the case of *Commonwealth v. Roby*, 12 Pick. 496, Chief Justice SHAW states the rule on that subject thus: "The result of the authorities is, that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshments have been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not

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authorized; there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly and may have been corruptly done."

It was held in *Shepherd v. Baylor*, 2 South. 827, where the jury left the room forcibly and against the will of the constable, that a finding subsequently returned by them should be set aside.

The fact that the jury in this case resorted to deception to secure the consent of the bailiff having them in charge to their separation, does not relieve the case from the effect of the rule. Our statute states as a cause for a new trial, "misconduct of the jury or prevailing party." This case comes clearly within the letter of the law, and in its very nature is such that we cannot say the appellant has not been injured by the irregularity. We cannot, therefore, question that it comes also within the spirit of the statute.

That the finding of a jury should be reached without its members being exposed to improper influences, has been regarded as essential to give any value to the verdict. It seems important that this rule should not be relaxed.

The agreement to disagree was no verdict, and the jury themselves so treated it; and their resort to misrepresentation to secure their separation exposes them to not unreasonable suspicion.

The motion for a new trial should have been granted.

The judgment is reversed, at costs of appellee, and the cause remanded for a new trial.

S. W. Short, for appellant.

E. D. Pearson and A. C. Voris, for appellee.

Harlock *v.* Barnhizer and Others.

HARLOCK *v.* BARNHIZER and Others.

MORTGAGE.—Redemption.—A mortgage of real estate executed and recorded after a decree of foreclosure on a former mortgage, but before sale under such decree, does not give the junior mortgagor the right to redeem. **Same.**—Suit by a junior mortgagee to redeem the mortgaged premises from a sale under a decree of foreclosure on a prior mortgage, to which decree the junior mortgagee, whose mortgage was unrecorded, was not a party. The complaint did not aver that the holder of the senior mortgage had notice of the unrecorded mortgage, or that the purchaser had such notice. **Held,** that the complaint was bad on demurrer.

APPEAL from the Hamilton Circuit Court.

GREGORY, J.—The appellant filed his complaint against the appellees, in which he seeks as junior mortgagee to redeem the mortgage premises from a sale thereof under a decree of foreclosure of the equity of redemption on a prior mortgage. The appellant was not a party to the decree. He held an unrecorded mortgage at the commencement of the foreclosure suit. After the decree, but before the sale, the mortgagor executed to the appellant a second mortgage on the premises sought to be redeemed, which mortgage was duly recorded before the sale. The wife of the mortgagor joined in the execution of each mortgage, but she was not a party to the decree of foreclosure. There is no allegation that the holder of the senior mortgage had notice of the unrecorded mortgage, nor is there any averment that the purchaser had any such notice. The court below sustained a demurrer to the complaint, and this is the alleged error complained of. The only question argued by counsel, and the only one considered by this court, is this: Had the appellant the right to redeem? It is claimed that the fact that the second mortgage was recorded before the sale gave the right.

The second mortgage was executed pending the proceedings to foreclose on the senior mortgage. It is a well established rule, that purchasers during the pendency of a suit are bound by the decree in the suit without being made

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parties. *Kern v. Hazelrigg*, 11 Ind. 443; *Green v. White*, 7 Blackf. 242.

The rights of the purchaser of the mortgage premises under the decree could not be affected by the unrecorded mortgage of which he had no notice.

We have not considered the question of the right of the appellant growing out of the fact that the wife was not a party to the decree. The power of the wife to convey or mortgage her inchoate right in the lands of her husband during his life, except by way of estoppel, presents a question of too much magnitude to be considered in the absence of argument.

The court below committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

A. F. Shirts, for appellant.

J. W. Evans, for appellees.

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MILLER v. DEAVER.

PROMISSORY NOTE.—Diligence.—In order to bind the assignor of a promissory note, such diligence only is required of the assignee in prosecuting the maker to insolvency as prudent men usually exercise in taking care of their own interests under the like circumstances.

SAME.—Where the assignee commenced his suit on the note against the maker in proper time, in the court first to sit after the maturity of the note, and the legislature, after the suit was brought, postponed the term of the court in which it was pending until after the sitting of another court; *Held*, that the assignee was not bound to dismiss that suit and commence in the other court.

SAME.—A judgment having been obtained in proper time by the assignee against the maker, execution was issued thereon twenty-three days after its rendition and twelve days after the close of the term.

Held, that, *prima facie*, this was due diligence.

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SAME.—*Excuse for Want of Diligence.*—The insolvency of the maker when judgment is rendered against him at the suit of an assignee, excuses the necessity of an execution.

SAME.—*Evidence.*—Where, in a suit by the assignee against the assignor of a promissory note, the plaintiff put in evidence a judgment recovered by him against the maker and a summons showing the commencement of the suit which resulted in the judgment, but omitted to introduce any other part of the record;

Held, that, as it did not appear that the judgment introduced was upon the note in suit, this evidence was insufficient to bind the assignor.

PRACTICE.—*Supreme Court.*—*Motion to Strike Out.*—No question can be made in the Supreme Court upon the refusal of the court below to strike out a portion of a paragraph of a pleading.

APPEAL from the Decatur Common Pleas.

FRAZER, J.—This was a suit by the assignee against the assignor of a promissory note. Questions were made upon the sufficiency of both paragraphs of the complaint. As to the first, it is argued that it does not show due diligence in prosecuting the makers to insolvency.

We cannot agree that the holder of the note, having commenced his suit in proper time in the court first to sit after the maturity of the note, was bound to dismiss that suit and commence in another court, the legislature having, after the suit was brought, postponed the term of the court in which it was pending until after the sitting of the other court. We know of no authority for requiring such extraordinary diligence. Such diligence only is required as prudent men usually exercise in taking care of their own interests under the like circumstances. To this extent only does the contract bind the assignee. If other proceedings out of the usual course would save the debt, the indorser can always put himself in position to resort to them for his own protection, at his own expense.

Nor can we assent to the proposition of the appellant, that in order, *prima facie*, to show due diligence, an execution should have issued earlier. Twenty-three days elapsed after the rendition of judgment, and twelve days after the close of the term. In *Dorsey v. Hadlock*, 7 Blackf. 113, twenty-four days elapsed after the rendition of judgment, and it

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was held a sufficient amount of diligence, *prima facie*. In *Spears v. Clark*, 3 Ind. 296, the Indiana cases upon this particular subject were reviewed, and it was declared that they authoritatively established the rule that the issue of execution in such cases may be delayed till a reasonable time therefor has elapsed after the close of the term at which judgment has been rendered, unless special circumstances are shown, requiring, as an act of good faith, that it issue earlier. In that case fourteen days elapsed after the close of the term, and thirty days after the judgment was rendered.

The second paragraph is like the first, except that it alleges the insolvency of the makers when the judgment was rendered, thus seeking to excuse the necessity of an execution upon the ground that it would have been wholly useless and unavailing. We think the demurrer to it was properly overruled.

It is assigned for error that the court below erred in refusing to strike out a portion of the second paragraph. We think that this action of the court was correct; but if not, no question upon it can be made in this court. This has been so frequently held that it cannot now need discussion.

But the judgment must be reversed for error in refusing a new trial; and this is the only error. The plaintiff failed utterly to prove that he had sued or obtained judgment upon the note. He put a judgment in evidence recovered by him against the makers, and a summons showing the commencement of the suit which resulted in the judgment, but omitted to introduce any other part of the record; and, consequently, it did not appear that the judgment was upon the note.

The judgment is reversed, with costs, and the cause remanded for a new trial.

J. Gavin, C. Ewing, and J. D. Miller, for appellant.

C. Shane and W. A. Moore, for appellee.

Gwinn and Wife v. Williams and Others.

GWINN and Wife v. WILLIAMS and Others.

VENDOR AND PURCHASER.—*Guardian's Sale of Real Estate.—Fraud.*—A guardian, for the purpose of obtaining to himself the title to the real estate of his ward, procured an order of sale and sold the land at public sale, but made report that he had sold at private sale as ordered by the court. He procured a person to bid off the land for his benefit and discouraged and prevented others from bidding. The purchaser assigned to the guardian the certificate of purchase given him by the guardian, and received back his notes for the deferred payments, the first payment not having been made, though the guardian had reported full payment. The commissioner appointed to make conveyance executed a deed to the guardian as assignee of the purchaser. The proceedings as they appeared upon the record were regular and valid. *Held*, that, as between the guardian and ward, the title of the former was bad, but not so the title of a purchaser from the guardian for a valuable consideration and without notice of the fraud, or the title of the vendee of such a purchaser.

APPEAL from the Johnson Circuit Court.

ELLIOTT, J.—This was a complaint by William M. Gwinn and Mary, his wife, formerly Mary Sanders, a daughter of one Daniel Sanders, deceased, against Henry Tucker, Phebe Hays and Joel Williams, to set aside, as fraudulent, certain conveyances of a tract of land, of one undivided half of which, it is claimed, the plaintiff Mary Gwinn is the owner in fee. The issues formed in the case were tried by the court, the trial resulting in a finding and judgment for the defendant. A motion for a new trial was overruled.

The case is here on the evidence. The facts shown by the record are, in substance, as follows: Daniel Sanders died seized of the land in controversy, prior to 1852, leaving a widow and three daughters—Mary, one of the plaintiffs, Caroline, and Nancy Ann. In 1852, the defendant Henry Tucker (who died during the pendency of this suit, his heirs being substituted as defendants) married the widow, and was appointed guardian of the persons and estates of the children by the Probate Court of Johnson county; and in August, 1852, petitioned said Probate Court for an order to sell the land, subject to the widow's dower;

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alleging that the land was going to decay and becoming less valuable; that the wards had not derived any material benefit therefrom; that they had no other means to defray the expenses of their keeping, clothing, and education; and that it would be to their interests to have the land sold, and the proceeds put at interest or invested in other lands. The record shows that an inventory and appraisement of the land was made by two disinterested appraisers, who, under oath, appraised it subject to the widow's dower, at twelve hundred dollars, which was filed in said court; that the guardian gave bond with surety in double the appraised value, which was approved by the court; and thereupon the court ordered that the guardian proceed to sell the land at private sale, at a sum not less than the appraised value thereof, the purchaser being required to pay one-third of the purchase money down, one-third in twelve months, and the remainder in eighteen months, from the day of sale, to be secured by note, without relief from valuation or appraisement laws; that at the succeeding January term of said Probate Court, the guardian filed a report in writing, stating, among other things, that pursuant to the order of the court, he did, on the 11th day of September, 1852, sell the land (which is described), subject to the widow's dower, to James J. Tucker for the sum of seventeen hundred and ten dollars and fifty cents, being more than its appraised value, and being the best price which could be obtained for the same; and that the whole of the purchase money had been paid. The report was verified by affidavit, and was confirmed by the court, and Daniel McKinney was appointed a commissioner to make and execute to the purchaser or his assigns a deed of conveyance of the land, subject to the widow's dower.

The guardian executed to James J. Tucker, the purchaser, a certificate of said purchase, dated September 11th, 1852, entitling him to a deed upon the payment of the purchase money, should the sale be confirmed by the court. On the 27th of September, 1852, James J. Tucker assigned the cer-

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tificate of purchase to Henry Tucker, the guardian. On the 8th of January, 1853, McKinney, the commissioner appointed by the court for that purpose, executed a deed for the land to Henry Tucker, as assignee of James J. Tucker, the purchaser, which was reported to, and confirmed by, the court. The deed recites the facts set forth in the petition, the order of sale and the report and confirmation thereof, his order of appointment, the certificate of purchase to James J. Tucker, and the assignment thereof to Henry Tucker. The widow of Sanders subsequently died, and Nancy Ann, one of the children, also died, soon after her mother, intestate and without issue.

Henry Tucker continued in possession of the land until November 11th, 1859, when he sold and conveyed it to Phebe Hays, for a valuable consideration, and she on the 23d of January, 1863, sold and conveyed it to Williams, who is still in possession.

Parol evidence given in the case very clearly proves that the only object of Henry Tucker, the guardian, in petitioning for the sale of the lands, was to procure the title to himself, at the lowest possible price, in total disregard of the interest of his wards. He sought to procure some one to become the purchaser for his benefit, and upon disclosing his object to an attorney, he was advised that he would better sell it at public sale, which, in fact, he did, though he reported it as sold at private sale. He finally procured James J. Tucker, a relative, to bid it off for his benefit, and at the time of the sale used every effort in his power to prevent others from bidding, by notifying them that they must show their money, and that he would not receive the bid of any one unless he had money enough there to meet the first payment; and in that way actually prevented one person from bidding who came to the sale for that purpose, but who had not brought his money with him.

There was but a single bidder present who was thus qualified, and he ran the land up to within a few cents of the price at which it was finally bid off by James J. Tucker.

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James J. Tucker was a witness on the trial, and testified that Henry Tucker procured him to bid off the land for his, Henry's, benefit, but that he was limited in price to one thousand seven hundred dollars; and that he finally bid it off at one thousand seven hundred and ten dollars and fifty cents, on his own responsibility and for himself, as it went beyond the limit fixed by Henry. He admits that he did not pay the first payment, but says that when Henry delivered him the certificate of purchase he executed notes for the deferred payments, which were returned to him by Henry when he transferred to the latter the certificate of purchase. Thus Henry, by a false report, procured the title to the land, without any portion of the purchase money having, in fact, been paid; although he subsequently accounted for it to his successor in the guardianship.

The case would be a clear one if the title had remained in Henry Tucker till after the commencement of the suit; but he sold and conveyed the land to Mrs. Hays some years before the suit was commenced.

The proceedings under which Henry Tucker procured his title were regular and valid, as they appear upon the record. Mrs. Hays purchased for a valuable consideration, and there is no evidence that she had any notice of the fraud of Henry Tucker; indeed, the evidence proves the reverse. Her title is therefore good, as she is protected as a purchaser for a valuable consideration without notice of the fraud, and that protection extends to Williams, her vendee.

The judgment of the Circuit Court must therefore be affirmed.

The judgment is affirmed, with costs.

F. M. & J. A. Finch and *D. D. Banta*, for appellants.

G. M. Overstreet and *A. B. Hunter*, for appellees.

Cross v. Wood and Others.

Cross v. Wood and Others.

SURETY.—GUARANTOR.—*Extension of Time.*—An agreement, made while the interest law of 1865 was in force, by a creditor with the principal debtor, without the consent of the surety or the guarantor, to give a limited time after the debt became due, in consideration of the payment in advance of four per cent. in excess of six per cent. interest, released the surety and the guarantor.

APPEAL from the Porter Circuit Court.

GREGORY, J.—Suit by the appellant on a promissory note and guaranty thereof against John Wood, Jr., Oliver Wood, John Wood, Sr., and Nathan Wood.

John Wood, Sr., was a surety, and Nathan Wood the guarantor. The defense successfully set up by them in the court below was, that the payee, knowing the relation of the parties to the note as principals and sureties, made an agreement with the principals to give three months time, in consideration of the payment in advance of four per cent. usurious interest, or four per cent. in excess of six per cent., without the knowledge or consent of the sureties.

The note was executed March 18th, 1865, duo fifteen months after date. The suit was commenced on the 3d of October, 1867. The trial was had on the 21st of September, 1868. The contract to give time was made in the month of January, 1867.

At the time this contract was made the act of December 19th, 1865 (Spec. Sess. 1865, p. 176), was in force. By that act, the contract to pay more than six per cent. interest was void as to the excess, but money voluntarily paid could not be recovered back, directly or indirectly.

It is claimed that *Harbert v. Dumont*, 3 Ind. 346, is not good law; and that *Redman v. Deputy*, 26 Ind. 338, is not in point from the fact that in the latter case there was a payment of legal as well as usurious interest in advance.

The taking of usury is not *malum in se*, but only *malum prohibitum*. By the law in force when the contract for

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delay was made it was not unlawful to take usury in advance.

The statute making the taking of usury a misdemeanor was repealed by the act of March 7th, 1861 (2 G. & H. 657, sec. 10). By the act of March 9th, 1867, it is provided, that all interest exceeding the rate of ten per centum per annum shall be deemed usurious and illegal as to the excess only. This was the law in force at the time of the trial, and by it, it was not usurious to take ten per cent. interest in advance. The validity of the agreement for the delay must, however, be tested by the law in force when the contract was made.

The evidence given on the trial in the court below is in the record, and by it, it is clear to our minds that substantial justice was done; and that there is no available error in the record.

The judgment is affirmed, with costs.

T. J. Merrifield and W. H. Calkins, for appellant.

S. I. Anthony, F. Church, S. E. Perkins, L. Jordan, and S. E. Perkins, Jr., for appellees.

PULLEY, Adminstrator, v. PERFECT.

DECEDENTS' ESTATES.—*Claims.*—The statement of a claim filed against a decedent's estate consisted of a copy of a note given by the decedent to the claimant, and was accompanied by an affidavit as required by the statute. *Held,* that the statement was sufficient.

APPEAL from the Tipton Common Pleas.

RAY, C. J.—The appellee filed against the estate of which the appellant was administrator a claim for allowance.

The statement consisted of a copy of a note given to the appellee by the decedent on whose effects the administration was had, and was accompanied by an affidavit that the

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claim was just and true and that there was no offset, as required by the statute. A demurrer was filed and overruled. Judgment for the appellee. The statement was sufficient. *Crabb v. Atwood*, 10 Ind. 822.

The judgment is affirmed, with costs.

J. Green, for appellant.

N. R. Overman and *G. W. Lowley*, for appellee.

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197	441
30	380
165	390

ADAMSON v. ROSE.

VENDOR AND PURCHASER.—*Title Bond*.—Suit on a title bond for the conveyance of certain land, “with the house, steam saw-mill, and all the privileges, appurtenances, and machinery of every kind to the same belonging.” Complaint averred that the purchase money had been paid in money, land, and property, which the defendant had agreed to receive and had received in payment; that plaintiff purchased with the express view of getting the steam saw-mill, believing the same to be situated on the land, which defendant knew; but that the mill was in fact situated on land to which defendant had no title; that certain appurtenances to the mill, without which it would be of little or no value, as well as part of the mill itself, were situated on a strip of land to which the defendant had no title and no right of control; that defendant had failed to make a deed for the mill and appurtenances, and could not do so. Prayer that the bond be canceled, but for judgment for the amount of the penalty.

Held, that the complaint was sufficient to entitle the plaintiff to damages, but not to authorize a rescission.

Held, also, that the prayer for rescission did not make the complaint bad.

Held, also, that the measure of damages in such case is the purchase money and interest.

Held, also, that the acceptance of property in accord and satisfaction bound the defendant to the fulfillment of his contract the same as if payment had been made in money.

PRACTICE.—*Special Finding*.—That the special finding of facts is inconsistent with the general verdict, is not a cause for a new trial; but the proper motion is for judgment on the special finding, notwithstanding the general verdict.

Adamson v. Rose.

SAME.—*Arrest of Judgment.*—A motion in arrest of judgment reaches any defect in the pleadings not cured by the verdict or the statute of amendments, or waived by failing to demur.

APPEAL from the Clay Circuit Court.

GREGORY, J.—Suit by Rose against Gilbert and Adamson on a title bond in the penal sum of three thousand dollars, conditioned as follows: “the said Gilbert has sold the said Rose the following tract of land” (giving description thereof), “with the house and steam saw-mill and all the privileges, appurtenances, and machinery of every kind to the same belonging, for the sum of fourteen hundred and fifty dollars; now, if the said Gilbert shall, on or before the 5th day of January, 1862, execute to said James M. Rose a good and sufficient deed in fee simple, clear of incumbrances, for the said property above described, this bond shall be void, else to remain in full force.”

The bond was executed by Gilbert as principal and Adamson as surety. Adamson demurred to the second paragraph of the complaint, which was overruled, and this is assigned for error.

It is averred in this paragraph, that the purchase money had long since been paid to the defendants, and each of them, by the payment of money and the conveyance of land and property to them and each of them, which they and each of them agreed to and did receive in payment and discharge of said fourteen hundred and fifty dollars; that at the time the plaintiff contracted for and purchased the land, he did it with the express view to and for the purpose of getting the steam saw-mill, supposing and believing the mill to be situated upon the land, all of which the defendants and each of them well knew: whereas the saw-mill was and is, in fact, situated upon land to which the defendants had no title; the mill being situated east of Eel river, on the east bank thereof, about one hundred feet from the water's edge; and between the mill and the river there is a narrow strip of land belonging to — —, in which neither of the defendants had any title whatever, and over which neither

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of them had any right of control; and from the west end of the mill there was and is as an appurtenance of the mill, a certain log shoot running to the river and over and across the narrow strip of land, between eighty and one hundred feet long, for the purpose of drawing logs from the river to the mill, which the defendants nor either of them had any right to erect and maintain, and without the use of which the mill would be very greatly reduced in value, and, in fact, of very little or no value; that the well and ditches which supply the mill with water for operating the same are upon the strip of land; that the defendants nor either of them had any right to the use of the water privileges; and that about fifteen feet of the west end of the mill is on the strip of land; wherefore the defendants and each of them had not only failed to make a deed for the mill and appurtenances, but are not in a condition to do so. This paragraph contains a prayer that the bond be canceled, but asks for a judgment for three thousand dollars damages, in consequence of the failure of the defendants to comply with its obligation.

It is claimed that the price and value of the land and property taken in payment and satisfaction of the purchase money ought to have been averred. We regard this paragraph sufficient to entitle the plaintiff to damages for a breach of the contract, but it does not contain averments enough to authorize a rescission. Viewed in this light, the allegation as to the payment of the purchase money is unobjectionable. The contract required the payment of fourteen hundred and fifty dollars in money. The payment in anything else was by the subsequent agreement of the parties. The acceptance of property in accord and satisfaction bound the defendants to the fulfilment of their contract to the same extent as if payment had been made in money. The measure of damages in such a case is the purchase money and interest. The prayer for rescission does not make the paragraph bad.

The next alleged error complained of, is the action of the

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court below in sustaining a demurrer to the seventh paragraph of the defendants' answer. That paragraph is an answer to the second paragraph of the complaint, and avers, that it was a part consideration of the bond, that the plaintiff was to make for Adamson, on his farm, six thousand rails and one thousand ground chunks, and deliver two thousand feet of lumber in the spring of 1861; which he had failed and refused to perform; and that he also received from Adamson, in part payment of the consideration for said bond, two lots in Bowling Green and two lots in Poland, which plaintiff received and still holds, and has never offered to rescind the contract or place the parties in the condition they were before the bond was executed.

The contract was for the payment in money of fourteen hundred and fifty dollars. The second paragraph of the complaint avers payment in money, land, and property. The seventh paragraph of the answer, if it amounts to anything, is an argumentative denial of payment, and as the general denial was in, no harm was done in sustaining the demurrer. But it is difficult to see the application of this paragraph to the case made by the complaint. The contract sued on did not embrace the rails, chunks, and lumber, nor the conveyance of the lots. How they became connected with, or formed any part of, the contract is not shown.

The court committed no error in sustaining the demurrer.

There was a jury trial, general verdict for the plaintiff, and answers to interrogatories. The defendants moved for a new trial which was overruled. Motion in arrest overruled, and judgment.

The code provides that "when the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." 2 G. & H. 206 sec. 337. The proper motion in such case is for judgment on the special finding, notwithstanding the general verdict. It is not one of the causes for a new trial. The motion in arrest reaches any defect in the pleadings not cured by the verdict or the statute of

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amendments, or waived by failing to demur. There is nothing, however, in the special finding inconsistent with the general verdict.

It is claimed that the special findings show that the plaintiff did not comply with his contract; but it was no part of the contract in suit, that the plaintiff was to make six thousand rails and one thousand chunks for the defendants; and a finding under the pleadings, that it was, and that the plaintiff had furnished but twenty-seven hundred rails, is not inconsistent with the general finding.

It is claimed, that the court erred in giving and refusing instructions. The motion for a new trial does not present any question as to instructions. The rule on this subject was carefully considered and passed upon in *Dawson v. Coffman*, 28 Ind. 220. That case goes as far as it is safe, in the fair and intelligent administration of justice.

The only remaining point made in the motion for a new trial is the alleged ground that the damages are excessive. We have looked through the evidence and think that the jury were warranted in their finding.

The judgment is affirmed, with costs, and five per cent. damages.

J. M. Hanna, for appellant.

S. Claypool, for appellee.

THE WHITE WATER VALLEY RAILROAD COMPANY v. QUICK.

RAILROADS.—*Injury to Animals.*—*Pleading.*—*Justice of the Peace.*—Complaint before a justice of the peace against a railroad company, averring that "a locomotive owned and used by the said defendant on its railroad in the county of Franklin and State of Indiana, on, &c., struck, ran against and over, and killed, one hog of the plaintiff;" and that at the time and place of the killing the road was not fenced.

The White Water Valley Railroad Company v. Quick.

Held, that by the liberality of construction which pleadings before a justice of the peace should receive, this sufficiently showed that the animal was killed in Franklin county, and that the defendant committed the injury.

Held, also, that an allegation that the road could properly have been fenced at the place of the killing would have been wholly unnecessary.

SAME.—*Where Required to Fence.*—A railroad company is bound to fence at a place where its road is situated on the tow-path of a canal abandoned as a thoroughfare.

APPEAL from the Franklin Common Pleas.

FRAZER, J.—This was a suit against the appellant, to recover the value of a hog of the appellee, killed by the appellant's cars, its railroad not being fenced. The case originated before a justice of the peace, and though there is only twenty-five dollars involved, the case is lawfully here.

The complaint alleged, that "a locomotive owned and used by the said defendant, on its railroad, in the county of Franklin and State of Indiana, on, &c., struck, ran against and over, and killed, one hog of the plaintiff;" and that at the time and place of killing the road was not fenced. It is argued that this does not show that the animal was killed in Franklin county, or that the appellant committed the injury. We think that by such liberality of construction as pleadings before justices of the peace should receive, the complaint is sufficient in these particulars. It is also urged that the complaint should have averred that the road could properly have been fenced at that place; but we think that such an allegation would have been wholly unnecessary. Affirmative matter of defense comes from the defendant, and need not, and indeed should not, be anticipated by the complaint.

The evidence disclosed that at the place where the hog was killed the railroad was situated on the old tow-path of the White Water Valley Canal, on the south side of the canal, and that there was no fence on the north side of the railroad. The evidence did not expressly disclose whether the canal was in use for any purpose or not. It might have been inferred from the evidence that as a thoroughfare it

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was abandoned—as is notorious. Railroads are not apt to occupy the tow-paths of canals in use as such. Then, was the appellant bound to fence at that place? We think so. The argument that the canal is a highway, and could not be lawfully obstructed by a fence, would do well enough in a proper case. But abandoned works of that character are probably not meant to be protected as highways. The verdict was right.

The judgment is affirmed, with ten per cent. damages and costs.

G. Holland and C. C. Binkley, for appellant.

H. C. Hanna, F. S. Swift, and W. G. Quick, for appellee.

SIGLER, Administrator, and Others v. HOOKER.

DESCENT.—*Widow's Distributive Share*.—A widow's share in the personal property left for distribution on the settlement of the estate of her deceased husband is the same whether she be the widow of a first or any subsequent marriage.

APPEAL from the Warren Common Pleas.

RAY, C. J.—On the final settlement of the estate of her deceased husband, the appellee, who was his widow by a third marriage, claimed one-third of the personal property left for distribution. The children of the deceased by his first wife answered, stating their claim to the entire personal estate. A demurrer was sustained to their answer, and distribution ordered to the widow, of one-third of the personal estate.

The proper result was reached by the ruling. The 24th section of the act regulating descent, 1 G. & H. 295, so far as personal property is involved, makes no distinction between the widow of a first or any subsequent marriage.

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The second clause of the section, improperly introduced by the word "provided," does not affect the personal, but by its terms is limited to the real estate.

The judgment is affirmed, with costs.

B. F. Gregory and J. Harper, for appellants.

J. H. Brown, far appellee.

FINCH and Another v. JACKSON.

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149 422

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WIFE'S PORTION.—*Subsequent Marriage.—Partition.*—If a widow marry, holding real estate by virtue of a previous marriage, her power to alienate such real estate is suspended during such subsequent marriage, but not the power of the court in a suit for partition to direct a sale and make such an investment of the proceeds as will secure the principal to her upon her surviving her husband, or to her children upon her death.

APPEAL from the Wayne Civil Circuit Court.

RAY, C. J.—The appellees brought his action for partition, alleging that Catharine Finch, who, with her husband, was made defendant, had, upon the death of her former husband, leaving said Catharine, his widow, and three children surviving, as his widow become seized of an interest of one-third in certain real estate; that the undivided two-thirds of such real estate had been sold to pay the debts of the estate of her deceased husband, and had been purchased by the said appellee; that the said Catharine had since intermarried; and he prayed a decree of partition. A demurrer was overruled by the court, and on the report of commissioners stating the property could not be divided, it was ordered to be sold.

The appellants assign the order and the ruling on demurrer as error. The ground of the appellants' objection is the statute providing that a widow holding real estate by virtue of a former marriage, shall not, during

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a subsequent marriage, with or without the assent of her husband, alienate such real estate. 1 G. & H. 294, sec. 18. This was held to be simply a personal disability, in *Jackson v. Finch*, 27 Ind. 316. The statute authorizing suits for partition does not make any exception in such a case, but declares, "that all persons holding lands as joint tenants, or tenants in common, or tenants in co parcellary, may be compelled to divide the same in the manner provided in this act." 2 G. & H. 361, sec. 1.

The right of the late widow, during her subsequent marriage, is suspended, as to her power of alienation, but not the power of the court to direct a sale in a suit for partition, and make such an investment of the proceeds as will secure the principal to her, upon her surviving her husband, or to her children, upon her death.

The judgment is affirmed, with costs.

C. H. Burchenal, for appellants.

J. B. & J. F. Julian and J. P. Siddall, for appellee.

JEMISON and Another v. WALSH.

PRACTICE.—*Objection to Evidence*.—An exception to the admission of evidence will not be considered by the Supreme Court, if the record do not show the ground of objection, and that the same had been pointed out to the court below.

APPEAL from the Johnson Common Pleas.

RAY, C. J.—This was a suit upon a note executed by the appellants, upon which judgment was rendered.

On the trial the appellants objected to the introduction of the note in evidence, but the court, as appears by the bill of exceptions, "overruled the objection, for the reason that the objection to the evidence was not pointed out." In *Russell v. Branham*, 8 Blackf. 277, it was held that the

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record must show that the ground of objection to the evidence offered had been pointed out to the court, and such objection, with the reason therefor, must also be made part of the record. This rule was recognized as late as the case of *Ammerman v. Crosby*, 26 Ind. 451. The exception to the admission of the note in evidence cannot, therefore, be considered in this court.

The judgment is affirmed, with ten per cent. damages and costs.

S. P. Oyler and D. W. Howe, for appellants.

G. M. Overstreet, A. B. Hunter, D. D. Banta, and C. Byfield, for appellee.

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125	52

TALBOTT and Another v. GRACE and Others.

DEDICATION.—*User*.—In order to show by user a dedication of the soil of an individual to public use, it must have been a user by the public adverse and exclusive of the use and enjoyment of the property by the proprietor, and not a mere use by the public under and in connection with its use by the owner in any manner desired by him.

PUBLIC LANDINGS.—*Prescription*.—The right to land boats and load and unload freight, and thus encumber the land of an individual adjoining a navigable river, cannot be acquired by the public by prescription or custom. Whoever claims such right by long usage must prescribe in a *que estate*.

APPEAL from the Ohio Circuit Court.

RAY, C. J.—This was an action by appellants to recover for the use of the wharf, landing, and real estate of the appellants.

An answer was filed in several paragraphs, but as only the ruling upon the seventh is discussed by the appellants we omit the others. This paragraph alleges that the ground in question is situated in the city of Rising Sun, and fronting on the Ohio river, and "had been used for more than

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twenty years before the loading of said boats, in complaint mentioned, by the public as a public landing and wharf in said city, for loading and unloading flat boats, and for mooring and fastening said boats, and for the convenience of the public in navigating said river by flat boats and other craft, all of which was well known to said defendants [plaintiffs] and those under whom they claim title, and with their assent." A demurrer was overruled to this paragraph.

This amounts to a claim of a dedication of the property to public use. The facts alleged, however, fail to show this. They do not show a dedication under such circumstances as to indicate an abandonment of the use exclusively to the community by the owners of the soil. To make a dedication it must have been a use by the public adverse and exclusive of the use and enjoyment of the property by the proprietors, and not a mere use by the public under and in connection with its use by the owners in any manner desired by them. *Irwin v. Dixion*, 9 How. U. S. 10.

But again, the dedication to the public claimed by this answer, is not of a simple right of way or passage, but to land boats, and load and unload freight, and thus encumber the land. No such use can be acquired by the public by prescription or custom. *Post v. Pearsall*, 22 Wend. 425; *State v. Wilson*, 42 Maine, 9. Such a right may, if held in England, be acquired by the inhabitants of a local district, but cannot extend to the public. Whoever claims it by long usage must prescribe in a *que estate*. Washb. Easm. p. 77 § 17; *Pearsall v. Post*, 20 Wend. 111.

The demurrer should have been sustained to the seventh paragraph of the answer.

The judgment is reversed, and the cause remanded for further proceedings.

A. C. Downey, for appellants.

Stevens v. Anderson, Administrator.

STEVENS v. ANDERSON, Administrator.

PAYMENT.—What Operates as.—Where the holder of a note gives it to the maker and takes a note held by the latter on a third person, this does not operate as a payment of the former note except by the express agreement of the creditor to take the latter note as payment, and at his own risk.

EVIDENCE.—Where in a suit on a promissory note the general denial is pleaded in answer, there can be no recovery on the note without proper evidence of its contents.

APPEAL from the Lawrence Common Pleas.

Suit by Anderson as administrator of Abraham H. Sears, against Stevens, the appellant.

The complaint was originally in five paragraphs, but demurrers were sustained to the first, second, and third paragraphs, and no question is presented on them in this court.

The fourth paragraph alleges that on the 4th day of January, 1862, the defendant Stevens was indebted to Sears in the sum of five hundred dollars, for certain real estate sold and conveyed to him by the latter; that said indebtedness was evidenced by a promissory note, as follows: “\$500. On or before the 25th day of December, 1861, I promise to pay Abraham H. Sears the sum of \$500, for value received, collectable without relief from valuation laws. September 6th, 1860. This note was given for land in section 18, town 6, north of range 1 west; and section 13, town 6, range 2 west. (Signed.) Jesse Stevens.”

That on the 4th of January, 1862, Stevens transferred by delivery to Sears two notes on one Street, one for two hundred and eighty-seven dollars and sixty cents, due one day after date, and dated November 7th, 1861; the other for three hundred and fifty dollars, due one day after date, but without date; that at the date of the transfer of said notes to Sears, Street, the maker, was wholly insolvent; so that at no time thereafter could the notes, or any part thereof, have been collected by suit or otherwise; that at the January term, 1863, of the county court of Bond county, in the State of Illinois, a judgment was recovered in the

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name of Stevens against Street on said notes for seven hundred and fourteen dollars and forty-four cents; on which an execution was issued on the 27th of the same month, to the sheriff of said county, who afterwards returned the same not satisfied, there being no property found whereon to levy. It is also averred that the note executed by Stevens to Sears remains due and unpaid; that Sears died, intestate, on the 19th of January, 1865, at Douglass county, Illinois, and the plaintiff was subsequently appointed his administrator by the proper probate court of said county.

The fifth paragraph is based on the same cause of action, but admits that Sears exchanged the note on Stevens for the two notes held by the latter on Street, but alleges that he was induced to do so by the false and fraudulent representations of Stevens that Street was solvent and would pay the same; that he, Stevens, at the same time well knew that Street was insolvent and worthless; that Sears at that time had no knowledge of the pecuniary condition of Street, and relying upon the representations of Stevens that he was solvent and would pay the notes, and the promise of the defendant that he would indorse the notes to him, made said exchange; that Stevens wrote the indorsements on the backs of the notes before delivery, but by mistake or fraud failed to sign the same; that Street was wholly insolvent at the time of the transfer of the notes to Sears, and so continued until he died; and at no time after Sears received the notes could the amount thereof, or any part of the same, be made off of Street in his lifetime, or from his estate after his death; that Sears forbore to sue Street on the notes, at the instance and request of the defendant, until January, 1863, when he recovered a judgment thereon in the name of the defendant, in the county court of Bond county, Illinois, for seven hundred and fourteen dollars and forty-four cents, on which an execution was issued on the 27th of the same month, which was returned by the sheriff of said county, to whom it was directed, not satisfied, there being no property found whereon to levy, &c.

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It alleges the non-payment of the note given by Stevens to Sears, notice of the insolvency of Street, and an offer to transfer the judgment on the latter to him; and demands judgment for one thousand dollars.

A demurrer to the fifth paragraph of the complaint was filed and overruled, and the defendant then filed an answer in five paragraphs:—

First, the general denial; second, payment; the third is limited to the fourth paragraph of the complaint, and alleges that Street was solvent when the notes on him were transferred to Sears, and for a long time thereafter, but that Sears neglected to sue thereon, without any authority from the defendant, until after Street became insolvent and the notes worthless. The fourth paragraph is confined to the fifth paragraph of the complaint: it admits the exchange of the notes, avers that the notes on Street were given by the defendant and accepted by Sears in payment and discharge of the five hundred dollar note, and denies all other allegations of that paragraph of the complaint. The fifth paragraph is directed to the fourth paragraph of the complaint, and alleges that the Street notes were transferred to, and accepted by, Sears in payment and satisfaction of the Stevens note for five hundred dollars.

A reply in denial was filed to the second, third, fourth, and fifth paragraphs of the answer.

The cause was tried by the court, without a jury. Finding for the plaintiff. Motion for a new trial overruled, and judgment.

ELLIOTT, J.—The material question in the case is, does the evidence sustain the finding of the court? The fourth paragraph of the complaint is founded on the note for five hundred dollars, given by the appellant to Sears. It admits the receipt by Sears of the two notes on Street, but alleges that they were only received as collateral security for the appellant's note. But it is insisted by the appellant that they were received by Sears in satisfaction, and as an abso-

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lute payment of the note for five hundred dollars named in the complaint. The fact that Sears took from the appellant the notes on Street, and gave up to him the note for five hundred dollars, did not necessarily operate as a payment and satisfaction of the latter: it could only operate as such by the express agreement of Sears to take the notes on Street as payment, and at his own risk. See *Tyner v. Stoops*, 11 Ind. 22, and cases there cited.

Here the evidence shows that Sears had instituted a suit against Stevens on the note for five hundred dollars, and whilst it was pending, Stevens called on Sears, who then resided in Illinois, and urged him to take the notes on Street. Sarah Sears, who was present at the interview, testifies that Stevens urged her father to take the Street notes, and told him if he went on with the suit then pending against him, Stevens, it would ruin him. Sears told Stevens, he was not much acquainted with Street, and did not like to take the notes. Stevens continued to urge him to take them, saying, "that two is better than one;" and Sears at last agreed to take the notes, "if Stevens would stand good for them," which Stevens agreed to do, and then told Sears not to push Street on the notes, that he believed Street was honest and would pay. The notes on Street were not then delivered to Sears. The parties left, and went to Nathan Dresser's, near by. Mrs. Dresser testifies that the parties (Stevens and Sears) called at her house and asked for pen and ink and made an assignment of the notes. [An assignment was written on each of the notes by Stevens, but he did not sign either of them.] Sears told Stevens that he did not consider Street good. Stevens insisted that he was, but repeated several times that if Street was not good, he, Stevens, was, and would make the notes good, that if Street did not pay them he would. The notes were then delivered to Sears. We think this evidence clearly justifies the conclusion that the notes on Street were not received as an unconditional payment of the five hundred dollar note, but would so operate if paid.

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But we cannot sustain the finding of the court under the fourth paragraph of the complaint, for another reason. The evidence shows that the Stevens note was in the hands of Sears' attorney at the time Sears received the notes on Street, and that the attorney, subsequently, on the order of Sears, delivered it up to Stevens. It was not produced on the trial. No notice had been served on Stevens to produce it, and the court, therefore, excluded parol evidence of its contents. The general denial was pleaded, and the plaintiff could not recover on the note without proper evidence of its contents. It follows that the evidence does not sustain the finding, under the fourth paragraph of the complaint.

And we do not think it is sufficient to sustain the charge of fraud under the fifth paragraph, and hence the judgment must be reversed.

There is nothing in the objections urged to the complaint.

The judgment is reversed, with costs, and the cause remanded for a new trial.

T. R. Cobb and N. F. Malott, for appellant.

E. D. Pearson and A. C. Voris, for appellee.

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SLANDER.—Pleading.—An *innuendo* cannot change the ordinary meaning of language.

SAME.—Code.—The code has not changed the rule of pleading in slander set forth in *Hays v. Mitchell*, 7 Blackf. 117, that where the words spoken are not actionable *per se*, but are so by reason of their allusion to some extrinsic fact, or of their being used and understood in a sense different from their natural meaning, there should be a prefatory allegation of such extrinsic matter, or an explanation of such particular meaning of the words, and the *colloquium* should connect with this introductory matter the speaking of the words complained of, leaving to the *innuendo* its proper office of giving to the

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words the construction borne by them in reference to the extrinsic fact, or to the explanation of their particular meaning.

CONTINUANCE.—Absent Witness.—Diligence.—Facilities for Travel An affidavit of a party for a continuance on account of the absence of a witness, filed on Friday, showed that the witness resided in Vigo county (where the cause was pending) and was temporarily absent, at Evansville, and that the affiant was not aware of the materiality of the witness until that week.

Held, that this did not show diligence in procuring the attendance of the witness.

Held, also, that this court is bound to know that a few hours will take a messenger from Terre Haute to Evansville.

HUSBAND AND WIFE.—Witness.—Upon the question whether the wife was a competent witness in a suit by husband and wife for slanderous words spoken of the wife, the court was equally divided.

APPEAL from the Vigo Circuit Court.

GREGORY, J.—Suit by husband and wife against the appellant for slanderous words spoken of the wife. The complaint is in two paragraphs. The first charges, that on, &c., Ward unlawfully and maliciously spoke the following false and slanderous words of the wife, that is to say: "She is a damned whore and a bitch."

The second charges, that on, &c., Ward said in the hearing of divers persons: "That he" (meaning Patrick Curly) "went to see her" (meaning Winifred Colyhan) "for that purpose" (meaning for the purpose of having criminal intercourse with her); which the plaintiffs say is false and slanderous.

The defendant demurred separately to each paragraph of the complaint. The demurers were overruled by the court, and the defendant excepted.

The defendant then answered, first, by the general denial; second, that the words spoken by the defendant were spoken to the plaintiff, Patrick Colyhan, without malice; third, justification.

The plaintiffs replied by the general denial.

The defendant on Friday, the 25th judicial day of the term, filed his affidavit for a continuance, on account of the absence of a witness. The court refused to continue the case, and this is assigned as one of the causes for a new

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trial. The affidavit shows that the witness resided in the county of Vigo; that he was temporarily absent, at Evansville; that the affiant was not aware of the materiality of the witness until that week.

The cause was tried by a jury. Verdict for the plaintiff. Motion for a new trial overruled, and judgment.

The court erred in overruling the demurrer to the second paragraph of the complaint. The words are not actionable *per se*; they could only be made actionable by proper averments. An *innuendo* cannot change the ordinary meaning of language. In the language of DEWEY, J., in *Hays v. Mitchell*, 7 Blackf. 117, the second paragraph of the complaint "is not so framed as to make the words stated a good cause of action. Something more than an *innuendo* was necessary for that purpose. An *innuendo* cannot aver a fact or change the natural meaning of language. There should have been a prefatory allegation of some extrinsic matter, or an explanation of the particular and criminal meaning of the words. This introductory matter having been stated, the *colloquium* should have connected with it the speaking of the words complained of, leaving to the *innuendo* its proper office of giving to those words that construction which they bore in reference to the extrinsic fact or explanation of their particular meaning." The code has not changed the rule on this subject.

The affidavit for a continuance was defective in not showing diligence in procuring the attendance of the absent witness. It is not shown when the witness left Vigo county for Evansville. He may have left the very day on which the affidavit was filed. The defendant was aware of the importance of the witness for four or five days, ample time to have sent to Evansville for him, had he been absent the entire week, by the ordinary mode of travel. This court is bound to know that a few hours would have taken a messenger from Terre Haute to Evansville.

There is another question in the record upon which this court is equally divided. See *Carnie v. Murphy*, 28 Ind. 88.

Livesey and Others v. Livesey.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the second paragraph of the complaint, and for further proceedings.

W. Mack and J. M. Allen, for appellant.

S. Davis and W. E. McLean, for appellee.

LIVESEY and Others v LIVESEY.

JURISDICTION.—*Title to Real Estate.*—A cause was transferred from the court of common pleas to the circuit court for the reason that the title to real estate was in issue, as appeared upon the face of the complaint.

Held, that the decision of the common pleas ordering the transfer was conclusive on the question of jurisdiction.

Held, also, that the ruling of the common pleas on demurrers to the complaint was *coram non judice* and void, and the action, when transferred, stood in the circuit court as an original cause brought therein.

STATUTE OF FRAUDS.—*Contract to Convey Land.*—In a suit for specific performance of a contract to convey real estate the complaint showed that the agreement to convey was not in writing, and there was no averment that possession of the land was given under the contract.

Held, that an answer of general denial did not raise the issue of the statute of frauds.

SAME.—Waiver.—If in such case the defendant does not insist on the statute of frauds, and the parol agreement is proved, or is admitted by the defendant, he thereby waives the requirements of the statute.

PRACTICE.—*Sufficiency of Complaint.*—The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur; but a motion in arrest in the court below, or an assignment of that error in the Supreme Court is necessary to raise the question.

APPEAL from the Henry Circuit Court.

GREGORY, J.—The appellee commenced suit in the Common Pleas Court of Henry county against the appellants for specific performance, and for work and labor. The complaint is in three paragraphs. 1. That defendant Livesey, on the 21st of February, 1857, purchased of one Bundy a

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tract of land, describing it, for eleven hundred dollars, for which sum the former became indebted to the latter; that the plaintiff was the son of defendant Livesey, and was then of the age of twenty-two years; that in consideration that the former would work for the latter until the land was paid for, the defendant Livesey agreed to convey and warrant to the plaintiff the land in question; that the defendant Livesey and wife executed a deed to the plaintiff conveying and warranting to him the land; that the deed was to be delivered to him in case he should work and labor for defendant Livesey until the land was paid for; that the plaintiff had performed his contract; that the deed was in the hands of defendant Stout; that a demand had been made on defendant Livesey for the deed, who refused to deliver it, or to permit Stout to do so. 2. Same as the first, omitting the allegations as to the deed. 3. Work and labor.

Prayer for specific performance, and for general relief.

The defendant, in the common pleas court, demurred to the first and second paragraphs of the complaint on the ground that neither of them stated facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant filed a second demurrer to the same paragraphs of the complaint, on the grounds: first, that the court had no jurisdiction; second, that the paragraphs did not, nor did either of them, state facts sufficient to constitute a cause of action; third, that several causes of action were improperly united.

This demurrer the court sustained, and thereupon made the following order: "And it now appearing to the satisfaction of the court that the title to real estate is in issue in this cause, thereupon the court transfers said cause to the circuit court of Henry county, Indiana, and the clerk of this court is ordered forthwith to file the papers in this cause, together with a transcript of the entries of record in this court, to said Henry circuit court."

In the circuit court there was no notice taken of the

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demurrs, but the defendants answered: first, the general denial; second, set-off. The plaintiff replied by the general denial.

Trial by the court; finding, "that the allegations in said complaint are true, and that said plaintiff is entitled to the possession of the deed referred to in said complaint as being in the hands of said defendant Elijah Stout."

Motion for a new trial, as follows: "1. The judgment is not sustained by the evidence, and is contrary to law. 2. For error of law occurring at the trial. 3. The judgment was for the plaintiff, when it should have been for the defendants."

The motion was overruled. The evidence is made a part of the record by a bill of exceptions.

The alleged errors assigned in this court are: "1. The said court erred in entertaining jurisdiction of said cause. 2. The said court erred in overruling the demurrer to the first and second paragraphs of the complaint first filed by the appellants. 3. The said court erred in overruling the appellants' motion for a new trial. 4. The said court erred in rendering a decree for a specific performance."

The common pleas court has no jurisdiction "when the title to real estate is put in issue," and when that appears on the face of the complaint it is the duty of the court to certify the case to the circuit court, in which latter court it stands for trial at the first term thereafter, "as if originally commenced therein." The decision of the common pleas court ordering the transfer is final. 2 G. & H. 22, sec. 11.

The ruling of the common pleas court in this case is conclusive on the question of jurisdiction. The want of jurisdiction appearing on the face of the complaint, it follows, that the ruling of the common pleas court on the demurrs was *coram non judice* and void, and the action stood in the circuit court as an original case brought therein.

Under the code requiring a copy of the instrument sued on to be made a part of the complaint, the allegations in

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this complaint show that the agreement to convey was not in writing. The code provides that "all defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially." 2 G. & H. 93, sec. 66.

The denial therefore in this case did not raise the issue of the statute of frauds, it appearing on the face of the complaint that the contract to convey was not in writing, and there being no averment that possession of the land was given under the contract. The question should have been presented on demurrer in the circuit court before answer.

The plaintiff proved, and the court found, that the allegations of the complaint were true. In the absence of the statute of frauds, this clearly entitled the plaintiff to the relief sought.

It is competent for a defendant to waive the requirements of the statute of frauds. If, for instance, he admits the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute. Story Eq. Pl. § 763; *Cozine v. Graham*, 2 Paige Ch. 177.

It is true, that the objection, that the complaint does not state facts sufficient to constitute a cause of action, is not waived by a failure to demur; but a motion in arrest in the court below, or an assignment of that error in this court, is necessary to raise the question. There is no such assignment of error in the case at bar.

It follows that the judgment in the court below must be affirmed.

The judgment is affirmed, with costs.

M. L. Bundy, J. Brown, and R. L. Polk, for appellants.

J. H. Mellett and M. E. Forkner, for appellee.

Wheeler and Another v. Me-shing-go-me-sia.

30	402
146	92
30	402
186	449

WHEELER and Another v. ME-SHING-GO-ME-SIA.

PLEADING.—*Justification.*—An answer setting up matter in justification of acts therein mentioned, but not indicating the acts justified as the acts complained of, is bad on demurser, but may be good as an affidavit against a temporary restraining order.

TRESPASS.—*License.*—One in whom is vested the legal title in fee in trust for himself and others cannot maintain trespass against a person whom he has himself licensed to do the acts complained of.

WASTE.—*Tenants in Common.*—One tenant in common may be liable to his co-tenant for waste.

SAME.—*Pleading.*—An averment in a complaint, that the trees cut, “as a part of the inheritance to which they attached, are not capable of being valued,” is not an allegation that the land has been diminished in value as an inheritance.

SAME.—*Common Law.*—The common law doctrine that the cutting of standing trees is waste, does not apply to the members of a band of Indians in the use of a large tract of wild land in this State granted to them by the United States.

INDIAN RESERVATION.—*Ultimate Title.*—A reservation of land in an Indian treaty of cession simply secures to those in whose favor the reservation is made a continuation of the right of occupancy in the land reserved, while the ultimate title remains in the United States, as before the treaty.

PRACTICE.—*Supreme Court.*—It will be presumed by the Supreme Court, nothing appearing to the contrary, that the court below tried the cause on the theories of the law as ruled on demurrers in making up the issues.

APPEAL from the Wabash Circuit Court.

GREGORY, J.—Suit by the appellee against the appellants for a trespass in entering upon the land described in the complaint, and setting up a portable saw-mill, and cutting a large quantity of walnut trees and converting them into lumber. The complaint avers, that the “trees as a commercial article were worth, standing upon the land, ten dollars each, and as a part of the inheritance to which they attached, are not capable of being valued.” The complaint avers title under the treaty with the Miami tribe of Indians, made the 28th day of November, 1840. By the 7th article of that treaty, it is stipulated “that the United States convey by patent to Me-shing-go-me-sia, son of Ma-to-sinia, the tract of land reserved by the second article of the

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treaty of the 6th of November, 1838, to the band of Ma-to-sin-ia."

By the second article of the treaty referred to, it is provided that, "from the cession aforesaid, the Miami tribe reserve for the band of Ma-to-sin-ia, the following tract of land, to wit: Beginning on the eastern boundary line of the big reserve, where the Mississinnewa river crosses the same; thence down said river with the meanders thereof to the creek called Forked Branch; thence north two miles; thence in a direct line to a point on the eastern boundary line two miles north of the place of beginning; thence south to the place of beginning, supposed to contain ten square miles."

The seventh article of the treaty made November 28th, 1840, *supra*, was amended as follows: "at the first period, insert—to be held in trust by the said Me-shing-go-me-sia, for his band; and the proceeds thereof, when the same shall be alienated, shall be equitably distributed to said band, under the direction of the President."

It is averred in the complaint, that the plaintiff sues for himself and some thirty-eight others named, who, it is alleged, compose the band of the plaintiff; that many of the persons named are minors, and some are married women.

The appellant Fowler answered: first, by the general denial; second, that the acts done were by the plaintiff's license; third; that Wa-co-co-nah was and is of the band of Me-shing-go-me-sia, and one of the beneficiaries of the land, and by consent of the plaintiff and the members of the band established himself on the south side of said reservation, at the mouth of Grant creek on the Mississinnewa river, many years since, and was allowed to exercise jurisdiction, authority, and control over about four hundred acres of the reservation, including all that portion where the mill was erected, the trees cut, and the other alleged grievances committed; that Wa-co-co-nah was permitted by the plaintiff and others of the band to open farms, grant leases, cut timber, build houses, and make other improvements on said tract, which was called the allotment of Wa-

Wheeler and Another v. Mc-shing-go-me-sia.

co-co-nah; that Wa-co-co-nah was recognized for a long series of years as entitled to exercise exclusive authority over said tract of land; that the plaintiff and all the leading members of the band had seen these improvements being made from time to time, the borders of the clearings extended year by year, and leases multiplying, without objection; that Wa-co-co-nah after all this, on the 12th of April, 1863, entered into a contract with Wheeler (the co-defendant), a copy of which is made a part of the answer, by which the former sold to the latter two hundred walnut and cherry trees then standing on the land allotted to the former, with the right to enter upon the land, erect a portable saw-mill, cut and convert the trees into lumber, and take it away; for which the latter was to pay the former two dollars for each tree; that the plaintiff well knew of the contract at and before the time the same was entered into, and approved it; that pursuant to the contract and approval, Wheeler and the defendant, under the license, and by the authority of Wheeler, entered upon the land and erected a portable saw-mill, and cut trees and sawed lumber—being the grievances set up in the complaint—all with the consent of Wa-co-co-nah, which are the supposed trespasses complained of.

Wheeler answered: first, the general denial; second, certain matters in justification of acts mentioned in the paragraph of the answer; but there is no averment that the acts justified were the acts complained of, nor is there anything alleged from which it can be inferred. This paragraph concludes with a prayer that it be taken as an affidavit against the temporary restraining order, and, perhaps, was good for that purpose, but as an answer was bad on demur-
rer, because it professed to answer the whole action.

Demurrers were sustained to the second and third paragraphs of Fowler's answer, and this is assigned for error.

It is attempted to sustain the ruling below, on the ground that Me-shing-go-me-sia held the land in trust and that as trustee he had no power to license the defendants to do the acts charged in the complaint.

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Under the treaty the legal title to the land was vested in the appellee in trust for himself and the other members of his band. Both Me-shing-go-me-sia and Wa-co-co-nah were tenants in common with the other members of the band, of the land in question. One tenant in common may be liable to his co-tenant for waste; but certainly the owner in fee of an undivided interest in land cannot maintain an action of trespass against one whom he has himself licensed to do the act complained of. It is difficult to see how Me-shing-go-me-sia could maintain this action over the facts set up in the second and third paragraphs of Fowler's answer.

It is by no means clear that the acts complained of amount to waste. The rule as to waste is laid down in *Dawson v. Coffman*, 28 Ind. 220. The averment in the complaint that the trees cut, "as a part of the inheritance to which they attached, are not capable of being valued," is not an allegation that the land as an inheritance was thereby diminished in value. It may be that the trees cut were incapable of being valued as an inheritance for the reason that as such they had no value whatever; and, moreover, it could be, in the face of the averment, that the land freed from the trees was of more value without than with them.

This large tract of land, of some ten sections, was granted by the United States (to whom it had been ceded), to the plaintiff in fee, for himself and the other members of his band. It was wild land. The doctrine of the common law as to waste could have no application to the members of the band. It was competent to change the forest into cultivated fields; to build houses on the land; to occupy and cultivate it in convenient portions; in short, to use it as a prudent farmer would do with his own land. The trees of our large forests are common articles of traffic. In the improvement and development of a new country they are as much an article of trade as the annual crops. There is nothing in the complaint, or in the answer, to show that either the appellant or Wa-co-co-nah transcended the power of dominion

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vested in them over the land in question in the license and contract set up in the answer.

There was a trial and a verdict for the plaintiff against the appellants. A motion for a new trial was overruled. The evidence, however, is not in the record.

It is claimed that the same matters set up in the answer to which the demurrs were sustained could have been given in evidence under paragraphs of the answer subsequently filed by the same defendant; but these facts, and much more, were necessary to sustain the allegations of the subsequent paragraphs. It must be held, nothing appearing to the contrary, that the court below tried the case on the theory of the law as ruled on the demurrs in making up the issues.

The appellant claims that the complaint is defective in not showing title in the plaintiff. It is argued that the treaty of November 6th, 1838, vested the fee in the band of Ma-to-sin-ia, and that the subsequent grant to Me-shing-go-me-sia by the United States passed no title.

This position cannot be maintained. The ultimate title was in the United States, with the right of occupancy in the Miami tribe of Indians; by the treaty of 1838 the Indian tribe ceded to the United States their right in certain territory named, but from this cession there was reserved by the tribe, for the band of Ma-to-sin-ia, the land in question. Now, the land thus reserved stood precisely as it did before the cession, so far as the ultimate title was concerned. It was left subject to a future cession to the United States. Moreover, the grant made to Me-sing-go-me-sia in trust for his band was not inconsistent with the previous reservation. Me-sing-go-me-sia was the son of Ma-to-sin-ia, and a member of the band of the latter. The grant was to the same band for whom the reservation was made.

The court below erred in sustaining the demurrs to the second and third paragraphs of Fowler's answer. But as the second paragraph of Wheeler's answer was not pleaded in

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bar of the trespasses complained of, there is no available error for him that ought to reverse the judgment for the damages assessed by the jury.

So far as the judgment for damages is concerned against the appellant Wheeler, the same is affirmed with costs. The residue of the judgment is reversed, with costs, and the cause remanded, with directions to overrule the demurrs to the second and third paragraphs of Fowler's answer, and for further proceedings.

J. U. Pettit and *T. T. Weir*, for appellants.

N. O. Ross and *R. P. Effinger*, for appellee.

POLLEY *v.* WOOD.

PRACTICE.—*Costs.*—In order that the costs may be taxed against the plaintiff on the ground that his cause of action would have constituted a proper counter-claim in a previous action brought against him by the defendant, and, having been personally served with notice, he omitted to set up such counter-claim, these facts should be presented by answer before trial, and cannot properly be made available after verdict.

APPEAL from the Wayne Circuit Court.

Polley purchased of Wood a lot of fat cattle, designed to be shipped and sold in the city of New York. By the terms of the contract, Wood was to keep the cattle for one or two weeks, during which time he was to feed them carefully and take proper care of them and keep them in good condition for shipment, and at the expiration of the time, they were to be weighed and then received and paid for by

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Polley at the rate of eight cents per pound, gross weight. At the proper time the cattle were weighed and received by Polley, who shipped them to New York. Polley subsequently brought this suit against Wood, alleging that the latter had wrongfully and fraudulently overfed, stuffed, and gorged the cattle, during the time he so kept them, whereby they were each made to weigh one hundred and fifty pounds gross more than they would have weighed if properly fed; that they thereby became sick and diseased, by reason of which the plaintiff was compelled to sell, and did sell them at great loss, &c.

On the final hearing a verdict was rendered for the plaintiff for three hundred and eighty dollars, for which judgment was rendered. But, on the defendant's motion, supported by affidavit and proof, the court rendered a judgment in favor of the defendant for costs, under the sixtieth section of the code. This ruling of the court presents the only question in the case.

ELLIOTT, J.—Section 60 of the code provides that, "if any defendant, personally served with notice, omit to set up a counter-claim arising out of the contract or transaction set forth in the complaint as the ground of the plaintiff's claims, or any of them, he cannot afterwards maintain an action against the plaintiff therefor, except at his own costs."

It appears by the affidavit before us, that in 1865, and after the cause of action in this case had accrued, Wood, the defendant, sued Polley in the Wayne Common Pleas, for a balance due and unpaid under the same contract, upon the same lot of cattle referred to in the complaint in this suit. Polley was personally served with process in that suit, and judgment was rendered against him therein for one hundred and sixty-seven dollars, for the balance due him on said cattle.

One ground of objection urged to the ruling of the court in reference to the costs is, that if the subject of action

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would have constituted a proper counter-claim in the suit referred to in the affidavit, the facts should have been presented by answer before trial, and that it could not be properly made available after verdict; and that the court erred, therefore, in entertaining the motion. The objection seems to be well taken. The same question was so ruled in *Norris v. Amos*, 15 Ind. 365, and we adhere to that ruling.

The judgment against Polley for costs is reversed, with costs, and the cause remanded to the Circuit Court, with direction to render a judgment against the defendant below for costs.

C. H. Burchenal and N. H. Johnson, for appellant.

J. Yaryan, J. B. Julian, and J. F. Julian, for appellee.

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GRAY v. GWINN.

PRACTICE.—Supreme Court.—Motion for New Trial.—A party making a motion for a new trial is bound by the reasons assigned therein, as shown by the record, and can urge no others in the Supreme Court.

SAME.—Judgment.—Form of.—The form of a judgment cannot be questioned in the Supreme Court, if not excepted to in the court below.

APPEAL from the Warren Common Pleas.

RAY, C. J.—This was an action by appellee upon two notes secured by mortgage. The appellant answered, that the notes were given as part of the purchase money for certain lands, and that by mistake the lands conveyed were supposed, and were represented by appellee, to include a certain strip which, in fact, was not embraced in the description inserted in the deed, and did not belong to the appellee; and he asked to set off or recoup the value of the strip against the claim of the appellee. The jury rendered a verdict for the appellee for \$1,652.67.

Gray v. Gwinn.

The first error argued by counsel is the overruling of the motion for a new trial, on the ground that the jury did not allow the appellant a sufficient amount for the land not included in the deed.

The finding of the jury is as follows: "We, the jury, find for the plaintiff, and assess his damages at sixteen hundred and fifty-two dollars and sixty-seven cents."

The reason for a new trial is in these words: "Because the damages assessed by the jury are not as much by three hundred and fifty dollars as the evidence in the case proved."

This is a singular reason to assign for a new trial, when it comes from the party against whom damages are assessed.

The statutory cause, "excessive damages," could have presented the question discussed in the brief of counsel. We cannot, however, disregard the record, and must hold the party bound by the reason assigned. That reason is no cause for a new trial in favor of appellant.

The next error is the order in the decree rendered by the court, that, "upon such sale and the payment of the purchase money, the sheriff shall execute to the purchaser a good and sufficient deed in pursuance of law." It is insisted that a certificate of purchase should have been ordered, with the right in appellant to redeem for the time fixed by law, and, on failure to redeem, the deed should have been ordered. Whether the order to execute the deed "in pursuance of law" does not include this, it is not necessary for us to decide, as no exception was taken to the form of the judgment, and therefore no question can be raised upon it in this court.

The judgment is affirmed, with costs.

J. H. Brown and D. H. Twomey, for appellant.

W. P. Rhodes, for appellee.

Lynch v. Leurs, Bishop of Indiana.

30	411
141	226
141	322

LYNCH v. LEURS, Bishop of Indiana.

WILL.—Partition.—A testator devised to his wife one-third of his real estate in fee and the remaining two-thirds for her life, directed that after her death such remaining two-thirds should be sold, and bequeathed one-half of the proceeds of the sale to a certain church, and the other half to his brother and sisters.

Held, that the widow might have the portion so devised to her in fee set off to her in severalty in a suit for partition, but that, claiming under the will, she could have no legal interest in the question of the capacity of the church to take under the will after her death.

HARMLESS ERROR.—A party cannot complain on appeal of an error by which he is not injured.

APPEAL from the Cass Circuit Court.

Suit for partition, &c. In 1866, Patrick Lynch died at Cass county, Indiana, testate, seized of the real estate described in the complaint, of the probable value of fifteen hundred dollars. He died without issue, and did not leave surviving either father or mother, but left a brother and sisters, whose names are alleged to be unknown, and also Nancy Lynch, his widow, who is the appellant. The will provides for the payment of his debts and funeral expenses out of his personal estate; and in reference to his real estate contains this provision: "I give and bequeath to my beloved wife, Nancy Lynch, the one-third part of my real estate in fee simple, and the use of the remaining two-thirds of my real estate for the period of her natural life. After her death, I direct that said two-thirds part be sold, and one-half part of the proceeds of said sale I give and bequeath to the Catholic Church of St. Vincent de Paul, at Logansport, Indiana, and the remaining half to my brother and sisters."

The complaint was filed by Nancy Lynch, the widow, alleging that her necessities required that for her support she should sell the interest devised to her in fee, which she claims under the will to be one-half of the whole, and therefore prays that partition may be made. It is also alleged in

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the complaint that John Henry Leurs, who is made a defendant, is Bishop of the Catholic Church of the State of Indiana, and as such owns the property known as the "Catholic Church of St. Vincent de Paul," situate in the city of Logansport, Cass county, Indiana; that said church has not, and never had, any corporate existence, and that the devise to said church is void, as being to a corporation having no existence.

The complaint prays for a construction of the will, "and that she may be granted the title and possession of the whole of said real estate, as widow of said decedent, and as against all of said defendants." Publication was made against the unknown heirs of the decedent, and they were defaulted. Leurs filed an answer in two paragraphs, admitting that the Catholic Church of St. Vincent de Paul is not, and was not at the death of the decedent, an incorporated body, but alleging that it is, and for many years has been, a regularly organized religious body and organization of persons, associated together according to the canons, laws, and regulations of the Catholic Church of the United States, for the purpose of teaching the gospel and the worship of God, according to the doctrines and belief of the Catholic Church, and that he was, and is, the Bishop of said Catholic Church for the diocese in which Cass county is situate, including said church of St. Vincent de Paul, in Logansport, and as such Bishop is invested in fee of all the property of said church, which he holds in trust for the use of said church, in the teaching of the gospel, the maintenance of religious worship, and the extension of the Christian religion in accordance with the doctrines of said church, of which the decedent was a member, and claims that the property so devised vests in him as such Bishop, in trust for the charitable uses and purposes aforesaid.

A demurrer to the answer was overruled. Issue was then taken on it, and on the final hearing the court found that the plaintiff was entitled under the will to one undivided third of the real estate described in the complaint, and was entitled

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to have the same set off to her in severalty; and that she was entitled to the remaining two-thirds during her natural life, and at her death the defendants would be entitled thereto. Partition was decreed accordingly, which was subsequently made and confirmed.

ELLIOTT, J.—The only question urged here for the reversal of the judgment and proceedings below is, that the court erred in holding that the devise to the Catholic Church of St. Vincent de Paul is a valid one.

The devise to the church is a bequest of personal, and not of real estate, and can only be executed under the will after the death of the appellant. True, the fund devised is to be the proceeds of real estate, which is required to be sold and converted into personality before the distribution can be made or the devise executed. The real estate from which the fund devised is to be raised is given to the appellant during her natural life, and it is only after her death that it is directed to be sold, and the proceeds distributed under the will, one moiety to the church named in the will. It was proper that the appellant should have partition, and the third of the estate devised to her in fee separated from the remainder, which she only holds for life, and given to her in severalty. But it is difficult to perceive what legal interest she can have in the determination of the question, at this time, as to whom the proceeds of that part of the property, when it shall be sold after her death, shall be distributed. The appellant claims under the will by which she holds that part of the estate during her life, and we cannot see that she has any legal interest in the question of what disposition shall be made of its proceeds after her death. We think that question is not properly before us on this appeal. It is prematurely raised, and by a party having no interest in its decision; and, therefore, it is neither necessary nor proper that we should here determine whether the bequest to the church is valid or void. If there

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was any error in the ruling of the Circuit Court touching that question, it did not injure the appellant, and she cannot, therefore, complain of it.

The judgment is affirmed, with costs.

D. P. Baldwin, for appellant.

N. O. Ross and R. P. Effinger, for appellee.

30 414
131 115
132 382

30 414
153 574

THE CITY OF INDIANAPOLIS and Others *v.* GILMORE and Another.

CITY.—Street Improvements.—Assessments.—Injunction.—An injunction will not be granted to restrain the collection of an entire assessment against a lot in a city for a street improvement made under a contract with the common council pursuant to a city ordinance, because in performing the work a portion of the lot has been wrongfully appropriated, the fence torn down, the soil removed, and a sidewalk made thereon.

SAME.—Recovery of Possession of Real Estate.—Nor do such facts make a case for the recovery of the possession of real estate.

SAME.—Trespass.—But such a state of facts constitutes a cause of action for trespass; and it is no defense thereto that the street improvement has been made under the provisions of the general law for the incorporation of cities, that no injunction was applied for or obtained prior to the making of the contract, and that the owner has permitted the street to be improved and has made no objection thereto until after the completion of the work.

APPEAL from the Marion Civil Circuit Court.

Mary Gilmore and Daniel, her husband, sued the city of Indianapolis, William H. Craft, treasurer of said city, Michael O'Connor, and Thomas Dorsey.

The complaint is fully set out in the opinion.

A demurrer to the complaint by O'Connor and Dorsey having been overruled and exception taken, these defendants answered in two paragraphs: first, the general denial; second, that the common council of said city, on the 16th of April, 1866, passed an ordinance providing for the gra-

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ding and graveling of Stevens street and the sidewalks thereto; that the contract for said grading and graveling was let to these defendants; that they did said work in pursuance of said contract, with the knowledge and consent of the plaintiffs, and by the plaintiffs' direction.

The city answered: first, the general denial; second, that the assessment was duly made by the authorities of the city, for the improvement of said street under an ordinance duly and properly passed, and under and by direction of the plaintiffs, and in accordance with the plaintiffs' instructions; third, that the street was improved under the provisions of the general law for the incorporation of cities; that no injunction was asked or obtained prior to the making of said contract for said improvement, but the plaintiffs suffered and permitted said street to be improved by grading and graveling, and made no objection to said improvement until after the work was completed.

The plaintiffs replied by the general denial to the second paragraph of the answer of O'Connor and Dorsey, and to the second paragraph of the city's answer; and demurred to the third paragraph of the city's answer. The demurrer was sustained, and exception taken.

The city treasurer made no appearance, and was defaulted.

Trial by the court; finding for the plaintiffs—that Mary Gilmore owned and was entitled to the possession of said lot; that the city of Indianapolis and O'Connor and Dorsey did wrongfully enter upon said premises and seize and take possession of a portion thereof and dig down and grade the same as a street, and exclude the plaintiff therefrom; that an estimate had issued against said Mary to collect that portion of the cost of said street improvement assessed against said lot, and was, at the time of bringing this suit, in the hands of the defendant, the treasurer of said city, who was then about to sell said lot thereon; and that said estimate and precept were illegal. Decree, that said Mary do recover the possession of that portion of said lot

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so wrongfully taken by defendants, to-wit, &c.; that the sheriff execute this order; that all proceedings under said estimate and the precept for the collection thereof be forever restrained and enjoined; and that the plaintiffs recover their costs from the defendants.

Separate motions for a new trial were filed by the city and the contractors, which were overruled, and the rulings excepted to.

FRAZER, J.—The appellees were plaintiffs below, and alleged in their complaint, that Mary, wife of Daniel, owned a lot in Indianapolis, bounded on the south by Stevens street; that in pursuance of a city ordinance, the common council contracted with the appellants O'Connor and Dorsey, to grade and gravel the street and sidewalks thereof; that the work was completed on the 2d day of July, 1866; that in performing it the appellants wrongfully took and appropriated a strip of the lot, seven feet wide, bordering on the street, broke down the fence, and removed the soil and made a sidewalk thereon, under pretense that the same was a part of the street; that an estimate of the work done by the contractors has been made and approved by the council, and a precept awarded against the lot for three hundred and eighty-eight dollars, the amount assessed against it, which the plaintiffs, by reason of the premises, refuse to pay; that the city treasurer, made a defendant, has advertised and will sell the lot unless restrained. Prayer for injunction, two thousand dollars damages, and possession of the strip of ground.

We think that the complaint made no case for an injunction. According to its averments, something was properly chargeable against the lot on account of the improvement of the street. Whatever was justly due should have been paid. Equity required this; and a party seeking equity must do equity. There is no warrant in sound principle or justice to sustain an injunction restraining the collection of an

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entire tax or assessment, merely because too much is charged. We have several times so held.

Nor does the complaint make a case for the recovery of the possession of real estate, for it does not sufficiently appear that possession is withheld.

But it does allege a trespass, and is therefore good on demurrer by O'Connor and Dorsey, the contractors.

If what has been said concerning the complaint is correct, it follows that the third paragraph of the city's answer was bad, and that the demurrer to it was properly sustained. It presented no answer at all to the only sufficient cause of action shown by the complaint.

The judgment of the court was not warranted by the complaint, and must be reversed, and a new trial awarded.

The evidence, indeed, strongly impresses us that there was no encroachment upon the plaintiffs' property, and that if any portion of the lot was improved as a street, it had been previously dedicated to public use as a street. But upon this subject we prefer to determine nothing, inasmuch as that question must be tried again.

The judgment is reversed, with costs, and the cause remanded for a new trial.

B. K. Elliott, S. Major, and J. B. Black, for appellants.

A. G. Porter, B. Harrison, and W. P. Fishback, for appellees.

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136	552
30	418
138	92
30	418
130	305

GOODNIGHT v. GOAR and Another.

MISJOINDER OF PARTIES.—*Plaintiffs.*—*Demurrer.*—Where two or more plaintiffs unite in bringing a joint action, the question whether they can properly join in the suit is raised by a demurrer for the want of sufficient facts.

SAME.—*Code.*—The code has re-enacted the rules which had prevailed in courts of equity as to who must join as plaintiffs, and may be joined as defendants; and as to those cases in which, in equity, plaintiffs might or might not have joined, at their option, it was intended that the subject should be governed by the rules of pleading in courts of equity—each case to be decided by the courts upon authority and analogy.

SAME.—Five persons subject to an impending draft for soldiers executed a written agreement to pay their proportional amount to hire substitutes to fill the places of such of them as might be drafted. Four were drafted, of whom one did not procure a substitute, avoiding military service and the necessity of procuring a substitute by failing to report himself for duty, and three hired substitutes and united as plaintiffs in an action against the others upon the agreement.

Held, that the plaintiffs could not formerly have joined in chancery, and that they could not properly join under the code.

APPEAL from the Tipton Circuit Court.

FRAZER, J.—The appellant and George W. Collier and Levin Cambridge sued the appellees, Eli J. and Benjamin F. Goar, upon the following contract:

“Jefferson Township, Tipton county, Indiana.

“We, the undersigned, citizens of said township, agree and bind ourselves in case either of us is drafted into the service of the United States, to pay our proportionable amount to hire substitutes to fill our places; and this we agree, not only for the present impending draft, but for all other calls that may be made during the present rebellion, unless a majority shall agree to abandon the above arrangement.

Given under our hands this 10th day of February, 1865.

(Signed)

G. W. COLLIER.

ELI J. GOAR.

BENJAMIN F. GOAR.

WM. H. GOODNIGHT.

LEVIN CAMBRIDGE.”

It was alleged in the complaint that all these parties were

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enrolled in said township and liable to draft then impending; that the plaintiffs and the defendant Benjamin were drafted, and that the defendant Eli was not drafted; that each of the plaintiffs hired and paid a substitute for himself, Collier for fifteen hundred dollars, and Goodnight and Cambridge each for eleven hundred dollars; which several sums were reasonable and necessary; that the defendant Benjamin, by failing to report himself for duty, avoided military service and the necessity of procuring, and did not procure, a substitute for himself; and that neither of the defendants has paid to either of the plaintiffs anything towards defraying the cost of said substitutes, though the same has been demanded.

A demurrer to the complaint, assigning the want of sufficient facts, amongst other causes, was sustained; and this is the only error assigned.

The question argued is, whether the plaintiffs could properly join in the suit; and we have heretofore held, upon full consideration, that, under the code, that question is raised by a demurrer for want of sufficient facts. *Berkshire v. Shultz*, 25 Ind. 528. In that case we expressed the opinion, that the rule declared in *Mann v. Marsh*, 85 Barb. 68, that "when two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie," was correct and best comported with the spirit of the code.

The code itself is not exactly definite as to who may be joined as plaintiffs. It provides, however, that judgment may be given for or against one or more of several plaintiffs (sec. 368), which was the practice in equity, though it was otherwise at law. It also provides (sec. 17), that all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except in certain cases mentioned in the nineteenth section. Indeed, the code seems to have re-enacted the rules which had prevailed in courts of equity, as to who must join as plaintiffs, and may be joined as defendants. But as

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to those cases in which, in equity, plaintiffs might or might not have joined, at their option, the code does not expressly speak, for the reason, probably, that the general rule in equity in relation to parties plaintiff was not founded upon any uniform principle and could not be expounded by any universal theorem as a test. Story Eq. Pl. § 539. And it may have been thought safer, therefore, to leave each case to be decided by the courts upon authority and analogy. That it was intended that the rules of pleading in courts of equity should govern the subject is quite evident from those provisions of the code which prescribe the relief which may be granted, and to whom; in this respect conforming in all respects to the established practice of those courts—a mode of administration quite impracticable in a great many cases, unless the parties might be as in chancery.

The present inquiry is, then, in view of the considerations above stated, reduced to this: could these plaintiffs formerly have joined in chancery? In solving this question we may be aided by considering the nature of the contract upon which the suit is brought. The obligations which it imposes are strictly several, each party for himself alone becoming bound in a certain event to pay. The obligation thus assumed is, under the facts alleged, to each one of the plaintiffs separately, by each defendant, for one-fifth of such sum as that plaintiff was obliged to pay for a substitute for himself. This proportion, thus due to one, cannot be either increased or diminished by the fact that another plaintiff is also entitled to recover from the same defendant a like proportion of the sum paid by him for a substitute. Each plaintiff has an interest only in compelling the defendants severally to reimburse him, and cannot possibly be affected by the success or failure of any one of his co-plaintiffs in the suit. Each plaintiff seeks by the action to attain an object for himself exclusively—the recovery of so much money as the defendants respectively owe him. They have therefore no joint or common interest in the relief sought, which is the object of the suit. Nor have they any joint or

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common interest in the subject or foundation of the action, which is the failure of the defendants respectively to pay according to contract. The failure to pay Goodnight does not concern any other plaintiff, and so, the failure to pay each of the plaintiffs is a matter of entire indifference to the others. If each two of the five persons to this agreement had mutually contracted by a separate writing to pay one-fifth of whatsoever sum might be necessary to procure a substitute for either, if drafted, there would have been twenty separate paper contracts, instead of one as now. It was a matter of convenience merely that one writing, executed by all, should have been adopted to evince their several undertakings; but it imposed exactly the same liabilities as if twenty writings such as we have mentioned had been used. In the latter case it would be too plain for doubt that each plaintiff must sue separately. Why should it be otherwise now? There is certainly no good reason. The statute has, it is true, provided, that persons severally and immediately liable upon the same instrument may, all or any of them, be sued in the same action, at the plaintiff's option. 2 G. & H. 50, sec. 20. This perhaps authorizes each of the present plaintiffs to join all the defendants in one suit. It is but the old equity rule as to defendants, in cases upon a joint and several contract, extended by the statute. Story Eq. Pl. § 159. It may, however, be worthy of consideration whether this statute was intended to apply to cases where by one instrument each maker becomes singly liable for a sum for which no other maker can in any event be held. But that question is not before us, nor is it now intended to express any opinion upon it.

In *Tate v. The O. & M. R. R. Co.*, 10 Ind. 174, it was said that "all who are united in interest must join (as plaintiffs) in the suit, unless they are so numerous as to render it impracticable, while those who have only a common interest in the controversy, may, one or more of them, institute an action. This, however, must not be understood as allowing, in all cases, two or more persons having separate causes of

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action, though arising out of the same transaction, to unite and pursue their remedies in one action. Several plaintiffs cannot by one complaint demand several matters of relief which are plainly distinct and unconnected. But where one general right is claimed, where there is one common interest among all the plaintiffs, centering in the point in issue in the cause, the objection of improper parties cannot be maintained." This statement of the general rules governing the subject, though quite comprehensive, is perhaps as specific as the state of the authorities will warrant. The matter is, in considerable measure, a question for the exercise of judicial discretion under the circumstances of each particular case, with a view to practical convenience in the administration of justice.

In the case before us there is in the plaintiff's no community of interest in any matter involved in the suit; no right common to all is claimed; everything is separate, save only that the right asserted by each is founded in a contract which for convenience happens to be upon the same sheet of paper. We have failed to find any warrant in the adjudged cases for a joinder of plaintiffs under such circumstances. The only possible suggestion in its favor is that a multiplicity of suits would be avoided; but even that is more apparent than real, and would be accomplished only in name, and not in fact. The number and variety of separate issues to be tried and of distinct judgments to be rendered would not be diminished in the least.

The judgment is affirmed, with costs.

J. Green and J. W. Evans, for appellant.

D. Moss, N. R. Overman, and G. W. Lowley, for appellees.

Ross v. Schneider.

Ross v. SCHNEIDER.

LANDLORD AND TENANT.—*Tenancy from Year to Year.*—A tenancy in which the premises are occupied by the assent of the landlord without any written or definite verbal agreement, the tenant paying the taxes and such other rent as the landlord requires, is, under our statute, a tenancy from year to year.

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SAME.—*Parol Contract.*—A tenant from year to year by parol may by parol convey or surrender his right of possession.

APPEAL from the Franklin Circuit Court.

ELLIOTT, J.—Suit by Schneider against Thomas Ross for possession of real estate. Answer, the general denial. Trial by the court without a jury.

The court found that the plaintiff was the owner, and entitled to the possession of the land described in the complaint, and assessed his damages at seventy-five dollars. Motion for a new trial overruled, and judgment on the finding. Ross appeals.

The reasons urged for a new trial are: first, that the finding is contrary to the evidence; second, that the damages assessed are excessive. These are the questions presented in this court.

The facts disclosed by the evidence are, substantially, as follows: John S. Ross, the father of the appellant, was the owner of the land, being seized thereof in fee. The appellant has been in possession as the sole occupant since 1859, as tenant of his father. There was no written agreement between them, nor was there a definite verbal one. The son occupied by the assent of his father, paid the taxes, and such other rent as the father required. He was, under our statute, a tenant from year to year. Schneider wished to purchase a farm, and with that view, on the 6th of April, 1868, called on the appellant, on the premises, and was informed by the appellant that the land could be purchased for four thousand dollars; that if Schneider purchased it, and would pay him two hundred dollars for the wheat then growing on the premises, he would give

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immediate possession, except, perhaps, the privilege of occupying a part of the house, stable, and granary until he could find some other place to go to. It was then time that preparations should be made for putting in the spring crop, and it is claimed by the appellant that Schneider was to enter into a written agreement with him that he would make the purchase on the terms proposed, and showing the time and terms of possession, and put up fifty dollars as a forfeit if he failed to do so. The evidence on this point indicates that such was the understanding at that time. On the next morning the appellant called on Schneider, who was then at the house of a neighbor of the appellant, and urged that they had better go at once and see his father, who resided at Connersville, in an adjoining county; accordingly, Schneider's son, who acted for and at the request of his father, accompanied the appellant to Connersville, where it was agreed between them and John S. Ross that Schneider should purchase the land at four thousand dollars, and the growing wheat at two hundred dollars, all of which should be paid to John S. Ross as the purchase money, who was to pay the appellant for the wheat. On the 18th of April the appellee paid John S. Ross one thousand eight hundred dollars, and gave him his note for two thousand four hundred dollars, due at twelve months, in consideration of the land and wheat, and Ross executed a deed to the appellee for the land. On the same day young Schneider, as his father's agent, called on the appellant and informed him that the purchase had been completed, and demanded possession. The appellant then refused to give possession of any part of the premises, and claimed the wheat as unsold. Thus far there is no material conflict in the evidence.

The appellant testifies, that when he and young Schneider went to see John S. Ross it was then agreed that if Schneider purchased the land, the appellant should be permitted to occupy part of the house and stable for from one to three months, and that an article of agree-

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ment should be entered into securing him that privilege, with fifty dollars to be paid by Schneider as a forfeit, if he failed to make the purchase. On the contrary, young Schneider testifies that as they left, after the interview with John S. Ross, the latter asked if they had not better enter into a written agreement, to which Thomas replied that he did not think it would make any difference. He further testifies that when he and the appellant reached Everton, on the way home, and were about to part, the appellant said that if he was not at Metsker's, where the appellee then was, by seven or eight o'clock the next morning, the appellee could go home, and it would be all right; that the appellant did not go to Metsker's the next morning; and that the appellee, after waiting till after the time named, went home. The appellee testifies that when the appellant called on him on the 7th of April, at Metsker's, he said if the purchase was made either that or the week following, it would be satisfactory to him, and he would give immediate possession; that on the Saturday following that conversation he sent his son to see if he would certainly get possession if he concluded the purchase; that his son reported to him he would; and that the appellant said they need not come to see him any more, but to go and make the purchase of his father, and it would all be right; and because of that information he completed the purchase on the Saturday following, without calling to see the appellant again. Young Schneider testifies that during the interview with the appellant, on the Saturday referred to, no definite time was fixed when the trade should be closed up, except that it must be during the next week, and that just as he was leaving, the appellant said it was no use to come and see him any more, but to go to his father and get the deed. George Metsker was also present at that interview, and testifies that the appellant said it would be all right if the appellee closed up the trade the next week. No particular time of the week was named; but he said if they did not

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close it up the next week they could not get the place. The contract was concluded and the deed made on Saturday of the then next week. The appellant, however, testifies, that he told Young Schneider, in the interview referred to, that if his father came and closed up the contract on the Tuesday following it would be all right; otherwise he should hold the wheat, and would not give up the possession.

There was some other evidence on both sides, tending, in some degree, to corroborate the evidence of the respective parties above stated.

There is a conflict in the evidence upon the material point on which the cause must turn. The plaintiff's evidence, if taken alone, we think is clearly sufficient to sustain the finding of the court. It is, however, contradicted on a material point by the appellant's evidence, but certainly not overwhelmingly so; on the contrary, we are not prepared to say that, when carefully weighed, the preponderance is not in favor of the finding. The principal object in requiring an article providing for a forfeiture of fifty dollars in the event Schneider should finally fail to make the purchase, evidently was to guard against the loss of time in putting in a spring crop, and when the terms of the contract were all agreed upon, and its consummation, in a very short time, rendered probable, the necessity or propriety of such an article would become less apparent, and might with propriety be waived. The evidence justifies the conclusion that it was waived. The purchase of the land was concluded, and the wheat paid for as agreed upon, which seems to leave no excuse for withholding the possession.

It is insisted, however, by the appellant's counsel that the transfer of the appellant's right of possession as tenant from year to year could only be conveyed or surrendered by a contract in writing, signed by him, and that a parol agreement for its sale or surrender is void under the statute of frauds. This position is untenable. His tenancy was from year to year, and existed only in parol; and if valid in him

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it would be strange if he could not transfer it in the same manner. *Peters v. Barnes*, 16 Ind. 219.

We do not think the damages are excessive.

The judgment is affirmed, with costs and ten per cent. damages.

G. Holland, C. C. Binkley, and W. H. Jones, for appellant.

H. C. Hanna, F. S. Swift, W. H. Bracken, and W. G. Quick, for appellee.

BRAGG and Others v. THE STATE, on the Relation of DAVIS and Another.

SHERIFF.—Different Executions Against the Same Person.—Of two executions in the hands of a sheriff in favor of different judgment plaintiffs against the same judgment defendant, it is the officer's duty, if not otherwise directed, to first levy the one first placed in his hands; and if he has failed to do his duty, by levying and collecting the later execution and paying over the money, leaving the former one unsatisfied, it is no defense to a suit against him and the sureties on his official bond for his failure to levy and collect the other execution, that the execution defendant had at the time the same was issued and still has sufficient property to satisfy it.

PRACTICE.—Failure to Reply.—The failure to reply to an answer which states no facts constituting a defense is not a cause for the reversal of a judgment.

APPEAL from the Hamilton Circuit Court.

RAY, C. J.—Suit by appellee against Bragg, sheriff, and the sureties on his official bond, for failure to levy and collect an execution placed in his hands. The second paragraph of the complaint charges that a judgment was rendered in favor of the relators on the first day of the term of court; and on the same day judgment was also rendered in favor of the Indianapolis National Bank. The relators caused execution to issue on the judgment in their favor, on the 2d day of November, 1866; and execution was taken out on the judgment in favor of the bank, on the 21st day

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of the same month. The sheriff levied and collected the execution sued out by the bank and paid over the money, leaving the execution in favor of the relators unsatisfied.

A demurrer to the complaint was overruled, but we have been furnished with no brief by appellants on this point, and we discover no error in the ruling.

An answer was filed in several paragraphs. The first was a denial. The second paragraph alleged, that the execution defendant had property, both real and personal, to satisfy the execution in favor of the relators. The third paragraph averred, that after taking out execution, the plaintiffs in the judgment instructed the sheriff not to levy. The fourth was *nul tiel record*. A demurrer was sustained to the second paragraph.

Subsequently a paragraph of an answer was filed to the first paragraph of the complaint, which alleged that the defendant in the execution had, at the time the same was issued, and still has, sufficient property to satisfy the execution. A motion was filed to strike out this paragraph, which was overruled. No reply was filed to this paragraph. This is assigned as error.

The facts stated constituted no defense. The duty of the officer was to levy the execution first placed in his hands; and it is no defense to answer that if he had done his duty the plaintiff in the execution would have received his money, and that if the plaintiff will issue a new execution, and can induce the sheriff to discharge his duty, the debt may still be collected. It is no defense for the sheriff to say, that the plaintiff in the execution has not received his money, simply because that officer has neglected or refused to discharge his duty. *Ledyard v. Jones*, 3 Seld. 550. The court therefore committed no error in sustaining the demurrer to the second paragraph of the answer. As the additional paragraph filed stated no facts which constituted a defense, the failure to take issue thereon is no cause for reversal. The finding of the jury was for the relators, and judgment was rendered accordingly.

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The jury found, in answer to interrogatories, that the attorney for the relators directed the sheriff not to levy the execution on the property of the judgment defendant, but before the execution in favor of the bank was issued, this request was withdrawn, and direction given to levy.

Error is assigned upon the admission of evidence and refusal to give instructions, but as no abstract is furnished of the evidence or of the instructions given and refused, we do not examine the record.

The judgment is affirmed, with ten per cent. damages and costs.

J. & W. O'Brien and A. F. Shirts, for appellants.

D. Moss, for appellee.

KING v. ANDREWS, Executor.

PRACTICE.—*Unavailable Error.*—A ruling in favor of the admission of evidence not proper to be admitted is not available as error if the evidence be not, in fact, put in.

WITNESS.—*Examination of.*—It is not error to allow a party to an action testifying as a witness to state the facts without being interrogated, the adverse party objecting.

PAYMENT.—*Application of.*—Where a person owes upon several distinct accounts, he has a right to direct his payments to be applied to any one of them as he chooses; but if he pays generally, the creditor may apply as he elects; and if neither makes a specific application, then the court will usually make the application, first to the most precarious security, or to the oldest debt.

APPEAL from the Jennings Common Pleas.

FRAZER, J.—This was a suit for specific performance of a contract for the conveyance of real estate. The chief question was whether the purchase money had been fully paid; and upon that point the evidence was so conflicting that we are not authorized to disturb the finding.

King v. Andrews, Executor.

The appellant's counsel argues a question as to the admissibility of parol evidence of the contents of a certain written agreement, and insists, very correctly, that a proper case for the allowance of such parol evidence was not made by preliminary proof of the loss of the writing; but, though the court below erroneously ruled otherwise, yet, inasmuch as such parol evidence was not, in fact, put in, it does not appear to us that the appellant was injured.

It is also insisted that the court erred in allowing the appellee, when testifying as a witness, to state the facts without being interrogated, the appellant objecting. We know of no reason or authority which would warrant us in reversing the case upon this ground.

There had been a previous written contract for the purchase of the same property from the appellee by the appellant, and a portion of the price agreed by that contract to be paid remained unpaid; the appellant had transferred his right under that contract to a third person, who sold his interest to the appellee, and then the latter entered into the contract with the appellant to enforce which this suit was instituted. After the last contract, property was delivered to the appellee more than sufficient to pay the last contract price; but the evidence was conflicting as to whether it had been specifically applied upon the last contract to a sufficient extent to discharge it; and it was not enough to satisfy both contracts. The appellant's counsel seem to assume that payments made after the last contract, would, by law, be applied upon that contract, though other indebtedness existed. But we are not of that opinion. Our understanding is, that when a person owes upon several distinct accounts, he has a right to direct his payments to be applied to either, as he chooses; but if he pays generally, then the creditor may apply as he elects; and if neither makes a specific application, then the court will usually make the application, first to the most precarious security, or to the oldest debt. *Field v. Holland*, 6 Cranch, 8; *Milliken v.*

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Tufts, 31 Maine, 497; *Capen v. Allen*, 5 Met. 268; Chit. Con. 827, and notes.

It is argued that the court below erred in holding that the last contract required some of the installments of the purchase price to be paid in cash, and that nothing else would, though received as payment, discharge such installments. We have looked carefully into the record, and it fails to show that any such ruling was made.

The judgment is affirmed, with costs.

Bachelor & Huckleberry and *H. W. Harrington*, for appellant.

C. E. Walker, for appellee.

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PRACTICE.—Instructions to Jury.—Record.—Where instructions are in writing signed by the judge, they become a part of the record, and exceptions may be entered in writing upon the margin, "given and accepted to," or "refused and excepted to," signed by counsel; but where they are not signed by the judge, they can only be made a part of the record by bill of exceptions.

SAME.—Motion for New Trial.—Amount of Recovery.—If, in an action on a promise to pay, the motion for a new trial does not specify the fifth statutory cause, no question as to the amount of the verdict is presented.

TRUSTS AND TRUSTEES.—Lost Writing.—Evidence.—At a regularly organized public meeting of the citizens of a township, called and held to raise money, volunteers, and substitutes, for the purpose of relieving the township of an impending draft for soldiers, various citizens agreed, each for himself, to pay divers sums for such purpose, and among them A., who was subject to the draft, promised to pay a certain sum on condition the township should be so relieved; if not, the money to be refunded. By the aid of the money so raised and promises so made, or by such money, promises, and otherwise, the township was relieved. Certain citizens were appointed by the meeting, to collect and receipt for the money so paid and promised, and to apply the same so as to effect the release of the township; and they collected the several amounts and so applied them, to the sat-

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isfaction of the promisors, including A, except the sum promised by A, who refused to pay on their demand.

Held, that the persons so appointed were trustees of an express trust, and entitled to sue on the promise of A.

Held, also, that the minutes of the meeting being lost, it was proper to introduce parol evidence of their contents; and the memorandum kept by the clerk of the meeting, of the names and the amounts pledged, was only a part of the minutes.

APPEAL from the Putnam Common Pleas.

GREGORY, J.—Suit by the appellees against the appellant. The complaint is in two paragraphs. The first avers that on, &c., the President of the United States ordered a draft for soldiers, that there was due under the order, from Cloverdale township — men; that while the draft was pending the citizens and residents of the township, including the defendant, who was at the time subject to the draft, called and held divers public meetings, for the purpose of raising moneys, volunteers, and substitutes, in order thereby to relieve the township from the draft; that at the meetings, which were regularly organized, and their transactions public and well understood, divers citizens and residents of the township, each for himself, agreed and promised to pay divers sums of money to relieve the township of the draft, and to employ men and soldiers to serve as volunteers and substitutes for the purpose aforesaid; that defendant Dix at the public meetings agreed and promised to pay for the purpose aforesaid, the sum of three hundred and fifty dollars, upon condition that the township was relieved from and of the impending draft, and that if the township should not be so relieved, then the money was to be refunded; that the township was relieved of the draft in pursuance of, and by the aid of, the money and promises so made and raised at said public meetings and otherwise; that the plaintiffs were duly selected and appointed by said meetings, in which the defendant participated, to collect, receive, and receipt for, the several sums so paid and promised, to attend to and superintend the application thereof in such manner as would effect the release of the township from the

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draft; that the plaintiffs, in the execution of their trust, collected the several amounts so promised, except the amount promised by the defendant; that the several sums so promised and collected were applied to the purpose aforesaid to the entire satisfaction of the promisors, including the defendant; that payment of the sum had been demanded of the defendant, who wholly failed to pay any part thereof.

The second paragraph of the complaint is substantially the same as the first, except it is averred in the former that the township was relieved from the draft by the money and promises made at the public meetings, including that of the defendant.

A demurrer was overruled to the complaint; and this is assigned for error.

Trial by jury; verdict for the plaintiffs; motion for a new trial overruled. The evidence is made a part of the record by a bill of exceptions.

There are a number of questions argued by counsel which are not properly in the record. The instructions copied into the transcript by the clerk are not signed by the judge, nor are they included in any bill of exceptions.

When instructions are in writing, signed by the judge, they become a part of the record. In such case it is only necessary to mark on the margin, "given and excepted to," or, "refused and excepted to," signed by counsel; but when they are not signed by the judge, they can only be made a part of the record by bill of exceptions.

The motion for a new trial did not specify the fifth cause, "error in the assessment of the amount of recovery;" and therefore no question is presented as to the amount of the verdict.

There are several objections made to the complaint. We think the complaint is good. The plaintiffs were trustees of an express trust, and were therefore entitled to sue on the promise. There was a valid consideration for the promise. The defendant was subject to the draft, and to relieve

Hill v. Starkweather.

himself from this burden, he attended these meetings and made the promise. The township was relieved from the draft by means of the money and promises made, according to the second paragraph, and by means of the money, promises, and otherwise, by the first paragraph. The substantial thing was obtained for which the defendant contracted. The condition of the promisor was complied with. The legal effect of the promise was to pay to persons properly selected by the meetings.

The minutes of the meeting being lost, it was proper to introduce parol evidence of their contents. The memorandum kept by the clerk of the meeting, of the names and sums pledged, was only a part of the minutes of the proceedings.

There was no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

D. E. Williamson and A. Daggy, for appellant.

F. T. Brown and J. A. Scott, for appellees.

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HILL v. STARKWEATHER.

JUDGMENT.—*Appeal after Payment.*—The right of appeal is not waived by the voluntary payment of the judgment.

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163 499

APPEAL from the Elkhart Circuit Court.

RAY, C. J.—The appellee moved in the court below to dismiss an appeal from the judgment of a justice of the peace, "for the reason that the transcript of the record shows that the judgment, interest, and costs, were fully paid by said plaintiff, voluntarily, prior to his perfecting the appeal in said cause."

Johnson's Administrators v. Unversaw.

This motion was sustained. This was error. *Armes v. Chappel*, 28 Ind. 469, where the case of *Dickensheets v. Kaufman* was referred to as authority; but the case not having been fully reported, it will be found to decide this question, by a reference to that case in 29 Ind. 154.

The motion to dismiss the appeal should have been overruled.

The judgment is reversed, with costs.

H. D. Wilson and J. D. Osborn, for appellant.

A. S. Blake and R. M. Johnson, for appellee.

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JOHNSON'S ADMINISTRATORS v. UNVERSAW.

DECREE.—Form of.—Where no exception has been taken in the court below to the form of a decree, the objection cannot be raised in the Supreme Court.

ESTOPPEL IN PAIS.—Fraud.—Where one of several defendants had a good defense, and by the fraudulent device of the plaintiff was prevented from making it, and also from making his motion within the time allowed by law, to set aside the judgment for mistake, inadvertence, surprise, or excusable neglect; *held*, that the plaintiff and his administrator were estopped from enforcing the judgment against such defendant.

SAME.—Excusable Delay.—Where the plaintiff did not attempt to enforce such judgment, but repeatedly asserted that as to such defendant it was released and satisfied; the plaintiff's administrator, seeking the enforcement of the judgment for the first time, could not complain that such defendant had delayed ten years in asserting his right.

APPEAL from the Marion Common Pleas.

GREGORY, J.—The complaint was by Unversaw against the administrators of Oliver W. Johnson, to enjoin the collection of a judgment obtained by Johnson in his lifetime against Unversaw and others. Its material allegations are, that on the — day of July, 1857, Johnson began in said

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court an action against Unversaw and four others for alleged injuries done by them to a carriage and span of horses belonging to Johnson, while in their custody as bailees for hire; that, in fact, the plaintiff (Unversaw) had never hired said horses and carriage, either by himself, or jointly with others, was in no way liable for said supposed injuries, and had not by any act or neglect of his caused or contributed to said injuries; that Johnson, knowing the facts and that this plaintiff had a full defense to the action, did, after the service of process and before judgment, fraudulently, and for the purpose of putting plaintiff off his guard, promise and assure him, that he would dismiss the action as to him, and would take no judgment therein against him; that in violation of his promise, Johnson did fraudulently cause judgment to be taken in the action against plaintiff for the sum of three hundred dollars; that since the decease of Johnson, the defendants, his administrators, have caused an execution to be issued on the judgment, and the same has been levied on lands of the plaintiff, and the sheriff is about to sell them; that after the time at which the judgment was rendered, when plaintiff first became aware of the judgment, and within one year from the date thereof, he remonstrated with Johnson for having thus fraudulently taken the judgment, and informed him of his intention to apply, under the statute, to have it opened and set aside; that Johnson informed plaintiff that the judgment was taken by mistake, and that if plaintiff would not make any application to set it aside, he, Johnson, would release and discharge him therefrom; that being on intimate and friendly terms with Johnson, and relying upon his promises and representations, plaintiff allowed the time to go by in which to make his application, under the statute, to have the judgment set aside, which he otherwise would have done; that Johnson, in his lifetime, never made any attempt to enforce the judgment, but, on the contrary, repeatedly asserted that the same was, as to this plaintiff, released and satisfied.

Johnson's Administrators v. Unversaw.

Prayer that the defendants may be restrained from enforcing the judgment.

To this complaint a demurrer by the defendants for want of sufficient facts was overruled, and the defendants standing by their demurrer, final judgment was rendered for the plaintiff, perpetually restraining the collection of the judgment, and that, so far as the plaintiff was concerned, the judgment be set satisfied, and the plaintiff released from all liability thereon. There was no exception taken in the court below to the form of the decree.

It is claimed that the court erred in overruling the demurrer, and that the decree ordering the judgment to be satisfied as to appellee is erroneous. If the decree is objectionable in form, the remedy of the appellants is not in this court. The court committed no error in overruling the demurrer. The appellee was prevented from making his defense, and also from making his motion within the time allowed by law, to set aside the judgment, for "mistake, inadvertence, surprise, or excusable neglect," by the fraudulent device of the intestate, and thereby he was, and the appellants as his administrators are, estopped from enforcing it. *Stone v. Lewman*, 28 Ind. 97, is instruction on this point. To a paragraph of an answer setting up, as a defense to an action on a judgment, substantially the facts alleged in the complaint in the case at bar, the court below had overruled a demurrer. This court say: "We perceive no error in overruling the demurrer to this defense. If its averments be true, the collection of the judgment would now be a gross fraud upon the defendant, which cannot find countenance in law. All the conditions of an estoppel appear."

The appellants have cited no authority, but they contend that the appellee has lost his remedy (if he ever had one) by gross neglect, in delaying ten years to assert his right. By the allegations of the complaint, the intestate never attempted to enforce the judgment; on the contrary, he repeatedly asserted that it was, as to appellee, released

Carter and Another v. Pomeroy and Others.

and satisfied. The administrators have no right to complain of a delay caused by their intestate.

The judgment is affirmed, with costs.

T. H. Bowless, J. L. Ketcham, and J. L. Mitchell, for appellants.

A. G. Porter, B. Harrison, and W. P. Fishback, for appellee.

CARTER and Another v. POMEROY and Others.

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RATIFICATION.—*Partnership.*—*Pleading.*—*Evidence.*—Suit upon a promissory note purporting to be made by a firm. Answer by two of the firm, that the note was executed in the firm name by a third partner after dissolution of the partnership, without authority from these defendants, the other members of the firm, or either of them, the payee having full knowledge of the dissolution. Reply, that after the execution of the note said two defendants, upon a settlement of the affairs of said partnership with the payee, with full knowledge of the existence of said note, fully ratified and adopted the same as their act and deed, and paid a certain sum thereon.

Held, that ratification is a fact, and was sufficiently pleaded in the reply.

Held, also, that it was competent on the question of ratification for the plaintiff to prove the consideration of the note.

SAME.—Where a promissory note given by one of a firm in the firm name after dissolution of the partnership, is executed on account of a pre-existing partnership debt, and afterwards the other partners, with knowledge of this fact, adopt such note, believing it to be just, and not caring nor disposed to trouble themselves as to the date or amount thereof, they are bound therefor.

EVIDENCE.—*Contents of Writing.*—The rule excluding parol evidence of the contents of a written instrument does not apply to a writing which is a mere incident connected collaterally with a question in issue.

SAME.—*Promissory Note.*—*Execution of.*—The question of the execution of a note is one of fact for the jury, in the determination of which it is proper that the note should be in evidence.

EXCLUSION OF EVIDENCE.—*Harmless Error.*—Error in the exclusion of evidence is not available on appeal, if the party assigning it has received all the benefit to be obtained by the introduction of the evidence excluded.

Carter and Another v. Pomeroy and Others.

INSTRUCTIONS TO JURY.—An instruction to the jury should not assume as a fact a matter in issue about which there is a conflict in the evidence.

APPEAL from the Bartholomew Common Pleas.

GREGORY, J.—Suit by the appellees against the appellants on four promissory notes purporting to be executed by “Carter, Pavay & Co.,” payable to Robert Spaugh, and by the latter assigned to the appellees. The notes are as follows:

1. For \$26.05, dated May 21st, 1866, payable one day after date.
2. For \$11.76, dated July 11th, 1866, payable one day after date.
3. For \$222.35, dated July 11th, 1866, payable one day after date.
4. For \$877.30, dated September 9th, 1866, payable one day after date.

On each of these notes there is a paragraph of complaint in the order stated above.

The appellants answered, as follows:—

“1. The defendants, William Carter and John J. Pavay, come, and for answer herein to the fourth paragraph of the complaint say that the defendants and one Joseph Carter, on the — day of —, 1864, formed a copartnership under the name and style of Carter, Pavay & Co., for the sole purpose of carrying on the milling business at Hope, in Bartholomew county, Indiana; that said partnership continued until the 6th day of August, 1866, when the same, by mutual consent of all parties, was dissolved. They aver that said note was executed by Joseph Carter on the 9th day of November, 1866, to Robert Spaugh, he signing thereto the firm name of Carter, Pavay, & Co., said Spaugh having full knowledge then and there of said dissolution of partnership. They aver that said Joseph Carter was in no way authorized by them, or either of them, to execute said note by the said firm name, or in any way to use said name for said purpose. They aver that said note was not executed by them, or either of them, and by no one by them or either

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of them authorized so to do; that the defendants, or either them, have at no time assented thereto; and the same is not their act and deed, or the act and deed of either of them."

This paragraph is verified.

The second paragraph of the answer sets up, that the note in the fourth paragraph of the complaint is without consideration.

The third paragraph of the answer sets up, substantially, that they had formed a copartnership for the purpose of carrying on the milling business, and that the note in the third paragraph of the complaint is without consideration to the extent of \$29.80, which was for goods sold to Joseph Carter for his sole and exclusive use and account, which Spaugh and Norris, the payees in the note, well knew, and the same was not used for the purpose and within the scope of the partnership, and appellants had not assented thereto.

The fourth paragraph avers, substantially, that during the time the notes in suit were held by Spaugh, and before any transfer to plaintiffs, or any notice thereof, he was indebted to them for an iron safe, valued at \$130, sold and delivered to him, and offers to offset the same *pro tanto*.

The fifth paragraph pleads payment.

The sixth paragraph avers an indebtedness on account of an iron safe, and offers to set off the same.

Reply: 1. The general denial. 2. For reply to first paragraph of answer, "that on the — day of March, 1867, the defendants, William Carter and J. J. Pavay, upon a settlement of the partnership affairs of Carter, Pavay & Co., with said Robert Spaugh, with full knowledge of the existence of said note, fully ratified the same, and adopted the same as their act and deed, and paid theron the sum of \$500."

A demurrer to the second paragraph of the reply was overruled, and the appellants excepted.

Trial by jury; verdict for the plaintiffs for \$655.12. Motion for a new trial overruled.

The evidence is a part of the record.

It is claimed that the court erred in overruling the de-

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murrer to the second paragraph of the reply. It is urged that the reply is insufficient, because it does not state the facts of the ratification. Ratification is itself a fact. According to WEBSTER, it is "the act of giving sanction and validity to something done by another; as, the ratification of a treaty by the Senate of the United States." The ratification in the instance given is the act itself, and not a conclusion drawn from other acts or circumstances. But the reply contains the further averment of the payment of \$500 on the note, with a full knowledge of the facts. There are two rules of pleading to which regard must be had in determining questions of this kind. One is, that facts, and not the evidence, must be pleaded. The other is, that facts, and not conclusions of law, must be averred.

The next error complained of is, that the court permitted the appellees to ask the witness Rominger the following question: "To whom was that note made payable?" The witness had testified as follows:—"About the 6th of August, 1866, John J. Pavy and Joseph Carter, who were partners by the firm name of Carter, Pavy & Co., met at their mill in Hope, Bartholomew county, Indiana. They had a settlement, settling up their affairs to that date. I was called on by Mr. Pavy to make calculations. They settled and closed up the partnership matters. Joseph Carter was ahead, John J. Pavy next, and William Carter next. William Carter and Joseph Carter joined their amounts together, which exceeded the amount of Mr. Pavy; and Mr. Pavy executed a note for the difference between Joseph and William Carter's amount found on settlement and that found in favor of said Pavy." He had thus, in part, without objection, given the contents of the note referred to, and the question propounded was merely as to a further description of the same note. The note was a mere incident connected with the alleged settlement of the partnership business. The rule excluding evidence of the contents of a writing did not apply.

The next error complained of is the exclusion of certain

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evidence offered by the appellants to show that the partnership indebtedness of Carter, Pavay & Co. amounted to \$30,000 in excess of partnership assets. The ground upon which this evidence was admissible was, that it tended to prove that the appellants were entitled to a credit for the iron safe mentioned in the fourth and sixth paragraphs of the answer. The jury deducted from the amount otherwise due on the notes one hundred and fifteen dollars. The proof shows that this was about the value of the safe. This was, therefore, a harmless error.

The court below committed no error in allowing the appellees to prove the consideration of the note declared on in the fourth paragraph of the complaint. It was at least competent on the question of ratification, if not as to the execution of the note.

It is claimed that the court erred in permitting the appellees to give in evidence to the jury the note for \$877.30, sued on, before showing a *prima facie* case. The execution of the note was a question of fact for the jury, and in the determination thereof it was proper that the note should be in evidence before them. There was abundant testimony to warrant the court in admitting the note in evidence.

It is claimed that the court erred in refusing to give certain instructions asked by the appellants. Some portion of these instructions were not applicable to the case made by the evidence. All that were applicable were covered by instructions given, except the following:—

“If you should find, from the evidence in the cause, that the dissolution of the partnership of Carter, Pavay & Co. was a matter of extreme general notoriety and repute in the town of Hope and in the neighborhood of Robert Spaugh, prior to the time of the execution of said note to Robert Spaugh by Joseph Carter, on the 9th of September, 1866, then you have a right to come to the conclusion that said Robert Spaugh, at said time, had knowledge of said dissolution, and it was sufficient to put him on inquiry thereof.”

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This instruction was rightly refused, for the reason that it assumes as a fact in the case the dissolution of the partnership, when that was a matter in issue, and about which there was a conflict in the evidence.

The giving of the following instruction is complained of: "And in determining this particular question, it would be proper for you to ascertain from the evidence whether anything said or done by them, having the appearance of a ratification or adoption of the same, or amounting to a ratification and adoption in fact, was said or done in ignorance of its contents and the facts connected with its execution. For, if they adopted or ratified the note, that is, recognized and treated it as the undertaking and promise to pay of the firm, in ignorance of facts connected therewith which would excuse them from liability thereon, and which would have enabled them to defeat the same, then a ratification and adoption made under such circumstances would not bind them, unless it should further appear from the evidence that it was executed on account of a prior existing liability, and that with a knowledge of that fact, they adopted it, believing it to be just, and not caring nor disposed to trouble themselves as to the date or amount thereof, in which event they would be liable therefor."

This is a correct exposition of the law on this subject. It is urged that the part of the instruction in italics is erroneous. We think otherwise. There is no conflict in the evidence as to the fact that the consideration of the note was a pre-existing partnership debt. If the appellants, with a knowledge of that fact, adopted it, believing it to be just, and not caring nor disposed to trouble themselves as to the date or amount thereof, it is clear that they are bound.

The court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

FRAZER, J., was absent.

F. T. Hord, for appellants.

W. & W. W. Herod, R. Hill, and G. W. Richardson for appellees.

Falls v. Hawthorn.

FALLS v. HAWTHORN.

NEW TRIAL.—*As of Right.*—In an action to recover real property a new trial was granted the defendant upon condition of the payment of costs in sixty days. After the sixty days, but within one year after judgment, he paid the costs and moved for a new trial. The judge having been of counsel, the motion was set down for hearing before another judge, and the order for a new trial was made after the expiration of the year.

Held, that the court could only make the order upon the payment of the costs, and, the costs not having been paid, the first order amounted to nothing.

Held, also, that the defendant, having entered his motion and paid the costs within the time fixed by law, thus secured the right to have a new trial, of which right the delay of the court could not deprive him.

CONVEYANCE TO HUSBAND AND WIFE.—Where land is conveyed in fee to a man and his wife, upon the death of either the land vests in the other in fee by right of survivorship.

ESTOPPEL.—*Judgment.—Process.*—In a proceeding for partition of real estate in the Probate Court, in 1848, a subpoena in chancery was issued August 21st, served August 24th, and judgment was taken by default September 22d. The complaint was at law (the court having also chancery powers, the statute requiring service of thirty days in chancery). After the interlocutory order of partition was made and commissioners were appointed and process was issued to them, the court, on motion, without notice to parties, permitted the petition to be amended by the insertion of other lands, and changed the order and process to agree with the amended petition. The commissioners were not re-sworn. Certain real estate owned in fee by one of the defendants, a married woman, whose husband was not a party, was set off to her as and for her dower, the remainder not being disposed of.

Held, that such married woman was not estopped by this proceeding and judgment from asserting her right to the fee simple of such real estate.

APPEAL from the Ripley Circuit Court.

GREGORY, J.—Suit by Falls against Hawthorn for the recovery of real property.

On the first trial there was a finding and judgment for the plaintiff. The defendant moved for a new trial on the payment of costs. The motion was granted, on condition that the defendant paid the costs in sixty days. After the expiration of the sixty days, but within one year after the rendition of the judgment, the defendant paid the costs, and moved for a new trial. The judge before whom the

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motion was made having been of counsel for one of the parties, the case was set down for hearing before another judge pending the motion. The order was made for the new trial after the expiration of the year. It is contended that the first motion and a failure to comply with the condition, was a waiver of the right to have a new trial on the payment of costs. The statute gives the right to have a new trial any time within one year, by the payment of costs. The costs not having been paid, the first order amounted to nothing. The court can only make the order upon the payment of the costs. It is urged, that the order could not be made after the expiration of the year. The defendant entered his motion and paid the costs within the time fixed by law. This conferred the right on him of having a new trial. The delay of the court to act on his motion could not deprive him of this right.

The appellant is the widow and survivor of one George Hawthorn. In 1821, one Holeman and wife conveyed the land in controversy by deed in fee to George Hawthorn and Polly Hawthorn (the appellant). The land was held under this deed by Hawthorn and his wife at the time of the death of the former. By the right of survivorship the land was vested in the widow in fee simple. *Davis v. Clark*, 26 Ind. 424.

The main question in the case arises on a judgment in partition in the Probate Court of Ripley County, commenced in August, 1848, wherein the appellee was plaintiff and the appellant, with others, was defendant. A subpoena in chancery was issued on the 21st of August, served on the 24th, and on the 22d of September judgment was taken by default. By the law in force at the time, thirty days service in chancery was required to authorize a judgment by default. R. S. 1843, p. 836, sec. 21. The complaint was at law, and not in chancery. The court, however, had chancery powers. R. S. 1843, p. 665, sec. 6. The party served with process has a right to rely on the information thereby obtained. It would be a very unsafe rule to hold that a

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subpoena in chancery could be converted into a summons at the pleasure of the party issuing it. After the interlocutory order of partition was made, and commissioners were appointed, and process issued to them, the court, on motion, and without notice to the parties, permitted the petition to be amended by the insertion of other lands, and changed the order and process to agree with the amended petition. The commissioners were not re-sworn. In the final report and judgment of partition, no part of the land in controversy was set off to the appellee, but this, with some other land, was assigned to the appellant as and for her dower—the remainder was not disposed of. The appellant, at the time of this proceeding, was a married woman, and her husband was not made a party.

We hold that the appellant is not estopped by this proceeding and judgment from asserting her right to the fee simple of the land in controversy.

The court erred in overruling the motion for a new trial.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial, and for further proceedings.

H. W. Harrington, for appellant.

J. W. Gordon, for appellee.

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CROWFOOT v. ZINK.

PRACTICE.—*Assignment of Error.—New Trial.*—If the court trying a cause overrules a motion for a new trial and the moving party excepts, the questions arising on the causes set out in the motion are saved for the consideration of the Supreme Court; and the assignment as error, that the court below improperly overruled the motion, presents all those questions to the appellate court; but the assignment of the *causes* as error is not the proper mode of raising any question embraced in the motion.

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VENDOR AND PURCHASER.—Vendor's Lien.—Pleading.—Suit by A. against B. on a promissory note. Answer, that the note was executed in part payment for certain land sold and conveyed by deed with full covenants by A. to B.; that A. had purchased the land of C., giving in part payment his two notes, which were due and unpaid; that before commencement of this action C. had notified B. that he held a vendor's lien on the land, which he intended to enforce; that C. had sued and obtained judgment on one of said two notes, and an execution issued on the judgment had been returned *null bona*; that at the time of conveyance by A. to B., the latter was ignorant of C.'s lien, the existence of which A. falsely and fraudulently concealed; that A. had sold all his real estate, had left the State, and was not a resident thereof; that defendant was informed and believed that plaintiff was wholly insolvent; that he had not left sufficient property within the jurisdiction of the court to satisfy any judgment which C. had obtained or might obtain against him, or any part thereof; that A. was not fully able to respond in damages to B. for any breach of the covenants in his deed; that B. was, and always had been, willing to pay the note in suit, and then paid the money into court. Prayer, that before the money should be paid over B. might be indemnified, &c. Judgment against B., and the clerk enjoined from paying the money to A. until, &c.

Held, that the answer was sufficient to entitle the defendant to the relief awarded him, independent of the averment on information and belief of the plaintiff's insolvency.

Held, also, that it was not necessary to set out, as part of the answer, a copy of C.'s judgment, or of the notes executed by A. to C.

Held, also, that C. had a right to pursue his remedy on the notes without waiving his lien.

APPEAL from the Washington Circuit Court.

GREGORY, J.—This case is here for the second time. See *Crowfoot v. Zink*, 26 Ind. 187.

The defendant, after the reversal, amended his answer. A demurrer was overruled to the second paragraph of the amended answer, and this presents the only question properly before this court.

The overruling the motion for a new trial is not assigned for error. It has been repeatedly held by this court, that the assignment of the cause for a new trial in the court below as error here, is not the proper mode to raise any question embraced in the motion. The statute provides that a motion for a new trial may be based upon certain specified causes. If the court trying the cause overrules the

Crowfoot v. Zink.

motion, and the moving party excepts, the questions arising on those causes are saved for the consideration of this court; and the assignment for error here, that the court below improperly overruled the motion, presents all that is embraced in it.

The second paragraph of the answer alleged, that the note sued on was executed in part payment of a certain tract of land purchased by Zink of Crowfoot; that the latter conveyed to the former the land by deed with full covenants; that Crowfoot purchased the land of one Allen, and in part payment therefor executed to Allen two promissory notes, one for nine hundred and fourteen dollars and sixty-five cents, the other for nine hundred and thirteen dollars and sixty-three cents; that Allen's notes were due and unpaid, and that before the commencement of this action, Allen notified Zink that he held a vendor's lien on the land, and intended to enforce it; that Allen had sued on one of the notes and obtained judgment thereon; that he had execution issued on the judgment and returned *nulla bona*; that at the time of the conveyance from Crowfoot to Zink, the latter was wholly ignorant of the existence of the lien; that Crowfoot falsely and fraudulently concealed the existence of Allen's lien; that Crowfoot has sold all his real estate, has left the State, and is not a resident thereof; that the defendant is informed and believes that Crowfoot is wholly insolvent; that he has not left sufficient property within the jurisdiction of the court to satisfy any judgment which Allen has or may obtain against him, or any part thereof; that the plaintiff was not fully able to respond in damages to defendant for any breach of his covenants in his deed; that the defendant was, and always had been, ready and willing to pay the notes, and then paid the money into court. Prayer, that before the money should be paid over, the defendant might be indemnified against Allen's lien, and for general relief.

The objections made to this paragraph of the answer are, first, that the insolvency of the appellant is averred on in-

Crowfoot *v.* Zink.

formation and belief; second, that it fails to set out a copy of the judgment of Allen against Crowfoot or of Allen's notes; third, it is claimed, that Allen's lien is merged in his judgment, and having failed in his action against Crowfoot to assert his lien, he has abandoned it. There are positive allegations enough in the answer, independent of that of insolvency, to make it good. The non-residence of Crowfoot, and his inability to answer in damages for the breach of the covenants in his deed to Zink, were sufficient to entitle the latter to the relief awarded to him by the court below.

Allen's notes and his judgment against Crowfoot were not the foundation of the answer. They did not belong to, nor were they under the control of, the appellee. It was not, under the code, necessary to make copies of them parts of the answer. Allen had a right to pursue his remedy on the notes, without waiving his vendor's lien.

The court committed no error in overruling the demurrer.

The court gave judgment against the appellee for the amount of the note sued on, and enjoined the clerk from paying over the money to the appellant until he indemnified the defendant against Allen's lien. This was substantial justice.

The judgment is affirmed, with costs.

J. Collins, T. L. Collins, and F. Wilson, for appellant.

H. Heffren, for appellee.

Blew v. Hoover, Administrator.

BLEW v. HOOVER, Administrator.

PLEADING.—Answer.—A paragraph purporting by a set-off to answer an entire complaint for a larger sum is bad on demurrer.

PRACTICE.—General and Special Findings.—Where a special finding does not conflict with the general finding, this court, in the absence of the evidence, will presume that the general finding is correct.

APPEAL from the Pulaski Common Pleas.

RAY, C. J.—The appellee filed his complaint in two paragraphs. The first charges the appellant with the conversion of two hundred and eighty bushels of wheat of the value of four hundred and ninety dollars, the property of the estate of which the appellee is administrator, and that on demand he has failed to account.

The second paragraph charges an indebtedness to said estate for wheat had and received of the deceased during his lifetime.

An answer was filed in four paragraphs: first, denial; second, that on the 1st day of November, 1864, said defendant entered into a special contract with the deceased, to harvest, thresh, and haul to market, twenty-two acres of wheat then growing on, &c., and when said wheat was so harvested and threshed, the same was to be delivered in the granary of said farm, and hauled to market and sold at the discretion of said defendant as he could best sell the same, and out of the sale of said wheat retain a sufficient sum to pay for said expenses and trouble, the balance to be paid over to said deceased. The defendant avers that he harvested and threshed said wheat and delivered the same in said granary, but owing to defects in the place of storing, and to a latent defect in said wheat, the same became heated and spoiled, and was destroyed by some insect; that as soon as defendant discovered said injury, he took steps to put the same in good order, and hauled the same to market; but he avers that by reason of said defect in said wheat, the same was worthless, and of little or no

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value, and the same now remains stored in the warehouse of one James Gill, in Winnemac, in said county, subject to the order of said administrator, on payment of the necessary expenses and trouble.

Third, that said estate is indebted to him in the sum of five hundred dollars, for work and labor done and performed at the request of decedent; and a bill of particulars is filed, amounting to two hundred and sixty-two dollars and sixty-five cents. This is filed by way of counter-claim.

The fourth paragraph alleges a special contract about cutting the wheat and harvesting the same, whereby the decedent became indebted to the defendant in the sum of five hundred dollars, and that it was agreed that said defendant should retain the wheat, or the proceeds thereof, until that sum was paid; and avers that he had the right to sell the said wheat and take pay for his labor therefrom; and that he hauled said wheat to market, and has the same ready for delivery on payment of said charges. The exhibit filed amounts to two hundred and sixty-two dollars and sixty-five cents.

The court sustained a demurrer to the third paragraph. This was correct; the paragraph and exhibit only showed a set-off of two hundred and sixty-two dollars and sixty-five cents, in answer to a complaint for four hundred and ninety dollars. It purported to answer all, and only answered a part.

There was a general finding for the appellee for two hundred and eighty-four dollars and twenty-five cents. In answer to questions, the court found that there was a special contract, and that Blew was to hold a lien on the wheat until he was paid; that a demand was made upon appellant, but no tender of money was made him at the time; no wheat was converted by Blew to his own use to the date of the commencement of the action, except sufficient to pay expenses of harvesting, threshing, and marketing.

The evidence has not been presented. The fact that

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there was a special contract, without any statement of what the contract was, cannot disturb the general finding. It may have been a contract of sale of the wheat, as alleged in the second paragraph, with the right given the defendant to sell in the market enough to pay his charges, and account for the balance at one dollar and seventy-five cents per bushel. What these charges amounted to in proof, we are not informed; but the finding implies that defendant has sold sufficient to repay them, and the general finding holding him liable for the balance, we must presume correct, in the absence of the evidence.

The judgment is affirmed, with ten per cent. damages, and costs.

G. T. Wickersham, S. E. Perkins, L. Jordan, and S. E. Perkins, Jr., for appellant.

D. P. Baldwin, for appellee.

30	452
145	70
30	452
149	161
149	168

DUTTON v. DUTTON and Another.

HUSBAND AND WIFE.—*Separation.*—A parol agreement made between husband and wife in view of separation and fully executed on the part of the husband, wholly for a consideration which in the light of all the circumstances of the parties at the time the contract is made is fair, reasonable, and just, will be upheld in equity; and the intervention of a trustee is not necessary.

SAME.—*Agreement Pending Suit for Divorce.*—A wife agreed, pending a suit for divorce in which a judgment for alimony was rendered at the time a decree of divorce was granted, to take certain lands of the husband in satisfaction of such judgment, and the deed was made and delivered to the agent of the wife, authorized by her at the time of making the agreement to receive the same in satisfaction of the judgment.

Held, that it was not essential to the validity of the agreement that it should be ratified by the wife after judgment.

PRACTICE.—*Cross Errors.*—In order to receive the consideration of the Supreme Court, cross errors must be entered upon the transcript.

APPEAL from the Porter Common Pleas.

RAY, C. J.—The appellant brought this action against

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Azuba Dutton, his former wife, and one Bartholomew, sheriff of Porter county, to enjoin a sale under an execution, and to secure satisfaction of the judgment upon which it was issued.

The complaint alleged, that the money judgment was rendered in favor of Azuba Dutton in an action brought by her for a divorce and alimony, in pursuance of an agreement between her and appellant, made "immediately before and after, on the same day" the judgment was rendered, that she would accept the conveyance by him of certain described lands, in full satisfaction of said judgment; and she authorized her attorney to receive such conveyance for her in full discharge of the same; that the deed was accordingly executed and delivered to her said attorney, and by him accepted in full satisfaction, and placed upon record; that notwithstanding the agreement, the said Azuba had caused execution to be issued on the judgment, and the sheriff had levied the same on the property of the appellant.

A demurrer was overruled to this complaint. The defendant answered in three paragraphs. First, in denial. A second paragraph was filed to which a demurrer was sustained.

The third paragraph of the answer alleges, that the judgment was rendered at the same time a decree of divorce was granted, and by said decree the appellee was entitled to the custody of three minor children, the issue of the marriage; that said judgment was rendered, in part, for the support of the children, and that she had no other means of support; and that since said time said Dutton has conveyed all his property, including said described lands, to the woman he has since married, with intent to cheat and defraud his creditors, and particularly the appellee and said minor children. To this paragraph the court overruled a demurrer. A denial was filed in reply to this paragraph.

On the trial, the appellant testified to the facts as stated in his complaint; fixing the value of the land conveyed at one thousand dollars; stating that at the date of the decree,

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he had not sufficient property to pay his debts, and that after the judgment he had notified her that he had conveyed the land. The attorney who had brought the suit for a divorce for the appellee, stated that the agreement had been made between the parties in his presence, pending the proceedings in court; that after the appellant had stated the amount of his property, he had named the sum of one thousand dollars as a fair and reasonable amount; and that the appellant stated that he had no money, but would convey this land in satisfaction of that amount, and would pay all costs, and the fee of the appellee's attorney; that the appellee said she knew the land, and was satisfied to accept it; and that she then directed the deed to be made and delivered to the witness in discharge of the judgment to be rendered, which was done after judgment, and accepted by him, but he had neglected to enter satisfaction. Dutton had appeared, in accordance with the agreement, and consented to the judgment for alimony.

The appellee for herself testified, that part of the consideration for her agreement to receive the land in full for the judgment, was the promise of the appellant to re-marry her in the course of three weeks after the divorce should have been granted, and that in the interval he would induce another woman, who had been the cause of the separation between them, to leave the county; that she knew nothing about the value of the land.

The appellant asked the following among other charges: "That a parol agreement made between husband and wife in view of separation, and fully executed on the part of the husband, wholly for a consideration which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable, and just, the contract will be upheld."

This was refused and excepted to, and the court gave this instruction to the jury: "If the jury find that the agreement relied upon, for defendant to take the land mentioned in complaint, in satisfaction of the judgment mentioned, was

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entered into before the judgment was rendered and during the pendency of the suit for divorce in which said judgment was rendered, and that the deed was made and delivered to the agent of Azuba Dutton, authorized at the time of entering into said agreement by her to receive the same in satisfaction of said judgment, they must find for said defendant, Azuba Dutton, unless they find that she ratified and consented to the same after the rendition of said judgment."

The giving of this instruction was excepted to. The finding was for the appellee.

We think the instruction asked fairly stated the law, and should have been given. In *Wilson v. Wilson*, 1 H. L. Cas. 538, it was unanimously held, "that the court of chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon." When such agreements are fairly made and are reasonable and proper, they will be upheld in equity, and the intervention of a trustee is not necessary. *Thomas v. Brown*, 10 Ohio St. 247.

The instruction given by the court did not properly state the law. The case must be reversed.

Cross errors are assigned, but not upon, nor attached to, the record. We cannot consider them, as the statute requires they should be "entered upon the transcript." 2 G. & H. 275, sec. 568.

The judgment is reversed, with costs.

F. Church, S. E. Perkins, and L. Jordan, for appellant.

T. J. Merrifield and W. H. Calkins, for appellees.

Sharp v. Fickle and Another.

SHARP v. FICKLE and Another.

PRINCIPAL AND SURETY.—Pleading.—In a suit on a promissory note by A., the payee, against B. and C., the makers, each of the defendants answered that he executed the note as surety of the other.

Held, where the parties went to trial as if they regarded the issue made, that such answers formed a sufficient issue between the makers, neither of whom could claim on appeal that his suretyship was confessed by the other.

SAME.—Evidence.—B. testified that he executed the note, intending thereby to be bound only as the surety of C., but A. and C. testified that they did not so understand it, and the previous negotiations tended strongly to show that they could not well have so supposed, and that if such was B.'s intention it was not made known.

Held, that this court could not, upon such evidence, interfere with a judgment against B. as a principal.

APPEAL from the Clinton Common Pleas.

FRAZER, J.—Fickle sued the appellant Sharp and the appellee Hazlett upon two promissory notes executed by them. Each of the defendants, by proper pleadings, claimed to be the surety of the other, and prayed that execution be first levied upon the property of the other. Sharp pleaded in bar that he was surety, as already stated; that he had served written notice on the plaintiff to sue, which was not done within a reasonable time, showing a good defense under the statute. A jury was waived, and the court found that both defendants were principals, assessed the damages, and over a motion by the appellant for a new trial, rendered judgment upon the verdict.

We are required to consider whether we shall reverse the judgment upon the ground that the evidence does not sustain the finding that the appellant executed the notes as a principal. He testifies that he executed the notes, intending thereby to be bound only as Hazlett's surety. Hazlett and Fickle both testify that they did not so understand it. The previous negotiations tend strongly to show that they could not well have so supposed, and if Sharp's intention was to be bound only as surety,

Hays v. Blizzard.

that intention was not made known. In such a state of the evidence, this court cannot interfere.

It is suggested that the appellant's allegation of suretyship was confessed by Hazlett, inasmuch as he did not deny it. But this is too refined; and besides, it comes too late. Hazlett's averment that he was Sharp's surety was a good denial, argumentatively, that Sharp was his surety, and *vice versa*. The parties went into their evidence in the court below as if they regarded the issue made, as it was, though awkwardly, and it will not do now for either of them to question the sufficiency of the issue, and claim that his case was confessed by failing to deny it.

The judgment is affirmed, with costs.

J. N. & C. Sims, for appellant.

R. P. Davidson, for appellees.

HAYS v. BLIZZARD.

MALICIOUS PROSECUTION.—To support an action for malicious prosecution, it must be shown that the prosecution is determined.

SAME.—Where an indictment has been quashed and the defendant discharged by the judgment of the court, there is such a termination of the prosecution as is necessary to support an action for malicious prosecution.

SAME.—*Probable Cause.*—The mere belief that a person has been guilty of a crime is not sufficient to authorize a criminal prosecution against him; but where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief, in the mind of a person of reasonable intelligence and caution, that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent.

30	457
152	186
30	457
155	54
155	60

APPEAL from the Tippecanoe Circuit Court.

ELLIOTT, J.—This was an action by Blizzard against Hays, the appellant, for a malicious prosecution. The complaint

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is in two paragraphs. A separate demurrer was overruled to each.

Issues were formed, which were tried by a jury. Verdict for the plaintiff. Motion for a new trial overruled, and judgment.

The first error complained of is the overruling of the demurrer to the second paragraph of the complaint. That paragraph alleges that the defendant "falsely, maliciously, and without any reasonable or probable cause, indicted and caused and procured to be indicted the said plaintiff for the alleged crime of forgery," upon which he was arrested; that the indictment was subsequently quashed, and the plaintiff released and discharged therefrom.

The objection urged to the paragraph is, that to sustain an action for malicious prosecution, it must appear that the plaintiff was finally acquitted of the criminal charge, and that his release therefrom in consequence of the indictment being quashed is not sufficient. All the authorities concur in saying that to support the action it must be shown that the prosecution is determined. But it was held in *Chapman v. Woods*, 6 Blackf. 504, after a very careful consideration of the question, that where a *nolle prosequi* had been entered to the indictment, and a judgment entered thereon that the defendant go hence acquit thereof, there was a final termination of the prosecution. It was ended by the judgment, and although a new indictment might be preferred, no further process could issue on the old one; and hence, such a termination was sufficient to support the action. The same result is produced by the indictment being quashed, and a judgment for the defendant thereon. In such case, a new indictment may be presented, but the first prosecution is finally ended when the indictment is quashed and the plaintiff discharged by the judgment of the court. We think there was no error in overruling the demurrer.

The next question presented by the appellant arises from certain instructions given by the court to the jury.

The court, after having said to the jury that, to sustain

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the action, the plaintiff must have shown: "first, that the defendant prosecuted the plaintiff, as is alleged in one or the other paragraph of the complaint; second, that such prosecution is at an end; and third, that the prosecution was instituted maliciously and without probable cause," gave to them the following instruction: "If you believe, from the evidence, that the plaintiff did destroy the receipt, or deface the record" (these being the acts for which he was prosecuted) "feloniously, and with intent to defraud, then there was probable cause, and the plaintiff cannot recover, even though you should find express malice; but, if you find, from the evidence, that the plaintiff's acts in relation to the receipt and record were not done with a felonious and fraudulent intent, but were innocent of guilt, then there was no probable cause, and the allegation in this regard is made out; and in this connection you may take into consideration the admission of Judge Turpie, that the whole facts in evidence in relation to the receipt and record show the plaintiff innocent of any crime; and we repeat, if he was innocent of any crime, under all the facts, there was no probable cause."

This instruction is clearly erroneous. It makes the question of the existence or absence of probable cause for the prosecution to depend solely upon the question of the guilt or innocence of the plaintiff of the crime for which the prosecution was instituted, and excludes the idea that probable cause for a prosecution could ever exist, where it should appear on final trial or by subsequent developments that the party charged was in fact innocent of the alleged crime. We are not aware of any authority to sustain such a proposition.

The mere belief that a person has been guilty of a crime is not sufficient to authorize a criminal prosecution against him. *Lawrence v. Lanning*, 4 Ind. 194. But where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief, in the mind of a person of reasonable intelligence,

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gence and caution, that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent. In *Lacy v. Mitchell*, 23 Ind. 67, "probable cause" is defined to be, "that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and in a civil case, that a cause of action existed." In *Bacon v. Towne*, 4 Cushing. 238, Chief Justice SHAW defines probable cause to be "such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest, and strong suspicion, that the person arrested is guilty." It is, however, urged by the appellee's counsel, if the instruction copied above is held to be erroneous, that still the judgment should not be reversed, for the reason, as is claimed, that the law was fully and correctly given to the jury in the eighth instruction. We cannot sustain this view of the case; as, allowing the eighth instruction to contain a correct exposition of the law, it is confined exclusively to the question of malice, and does not in any wise apply to the question of probable cause.

The seventh instruction was wrong, and though the evidence is before us, we cannot say that it did not mislead the jury; and the judgment must therefore be reversed.

The judgment is reversed, with costs, and the cause remanded for a new trial.

D. Turpie, H. W. Chase, and J. A. Wilstach, for appellant.

T. A. Huff and J. Applegate, for appellee.

Huston v. Roots and Another.

HUSTON v. ROOTS AND ANOTHER.

EVIDENCE.—*Deposition.*—On the trial the court suppressed the answer to this question in a deposition: “State what would be the duty of a commission merchant in this city by the custom of trade here, in reference to the sale of a lot of lard, upon the receipt from the owner of such letters as are hereto attached, and marked ‘Exhibit A and B’”

Held, that it was sufficient to justify the court in excluding the answer, that no such letters as were set forth in the exhibits were introduced on the trial, were there no legal objection to a witness’ placing a construction upon a written paper.

APPEAL from the Fayette Circuit Court.

RAY, C. J.—The appellees, commission merchants in the city of Cincinnati, sued the appellant for money advanced for the purchase of lard, which was not repaid in full by the sale of the same. Answer, denying the complaint, and a special paragraph alleging that the loss occurred by the failure to sell the lard when instructed so to do. A reply in denial.

On the trial the court suppressed the answer to the following question, contained in the deposition of a commission merchant doing business in Cincinnati, Ohio, where the sale was made:

“State what would be the duty of a commission merchant in this city, by the custom of trade here, in reference to the sale of a lot of lard, upon the receipt from the owner of such letters as are hereto attached and marked ‘Exhibit A and B.’”

It was sufficient to justify the court in excluding the answer, that no such letters as were set forth in the exhibits were introduced on the trial, were there no legal objection to a witness’ placing a construction upon a written paper.

The finding was for the appellees, in the sum of nineteen hundred and twenty-four dollars and ninety-nine cents. On the trial the appellees introduced in evidence the following letters:

“Connersville, February 6th, 1866.

“Messrs. Roots & Co., I wish you to buy me one hundred

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tierces of lard, not to exceed seventeen and three-fourth cents per pound, and I will send, as a margin, five hundred dollars, next week or the first of the week after. Money is very scarce here in the country, but if you buy that, I will try and raise some more means, so as to make the investment larger. Answer as soon as you can.

Yours truly, W. H. HUSTON."

"Connersville, February 9th, 1866.

"Messrs. Roots & Co., Yours of the 7th is at hand. If you can't buy the lard at seventeen and three-fourths, buy at eighteen, and advise me without delay—that is, as soon as you buy.

Yours respectfully,

W. H. HUSTON."

The next letter of February 16th, 1866, acknowledged the receipt of notice of the purchase of the lard, and the statement that Roots & Co. were to carry the investment at the rate of ten per cent. interest per annum. A witness was introduced who proved the purchase of the lard at eighteen cents per pound, and the sale from the 2d to the 4th of April, at twelve cents per pound, the best price at that date. Drayage, storage, insurance, government tax, commissions, and interest, after adding the margin deposited by the appellant to amount realized by the sale, left a balance due of two thousand and thirty-three dollars and fifty cents. The following letters were introduced by the appellant.

"Connersville, Ind., September 3d, 1866.

"Messrs. Roots & Co., Cincinnati, Ohio:

Dear Sirs, My business is at present so pressing that I cannot well leave. I discover that lard does not advance as was generally expected, and I would be pleased to have a letter from you, with an expression of your views as to future prices in that and provisions. I will endeavor to come down shortly.

Yours respectfully, W. H. HUSTON."

"Cincinnati, Sept. 22d, 1866.

"William H. Huston, Connersville, Ind.:

Dear Sir, Since you were here we have made some in-

Huston v. Roots and Another.

quiries about telegraphing and shipping to New Orleans. We find it very uncertain selling lard to arrive, and even if we should make a sale, in case the market declines the party would not probably take it, and altogether it is a very uncertain thing, and not at all advisable.

Very respectfully, Roots & Co."

"Connersville, October 15th, 1866.

"Messrs. Roots & Co., After my respects to you, if you have not sold my lard, I think it is really time to realize what is in it, as you know in Connersville I gave you to do what you thought best with the lard. Please exercise your own judgment when to sell, but don't put it off too late. I wish you would buy me from two hundred to five hundred bushels of clover seed at the market price, soon; be sure to get a good quality. If you get it, let me know, and I will send you a fair margin. I have full confidence in your judgment, that you will act for my interest as well as your own. Please answer without delay.

Yours respectfully, W. H. HUSTON."

This answer was introduced by appellees:

"Cincinnati, Oct. 18th, 1866.

"W. H. Huston, Esq., Connersville, Ind.:

Dear Sir, Your favor of the 15th is at hand. Our lard market is very dull at fifteen to fifteen and one-fourth cents, at which price we decline selling without positive instructions from you." We omit the portion of the letter in regard to clover seed. It closes, "we hold about the same quantity of lard that you do on our own account, which we decline selling, but if you say sell yours, we will do so.

Yours truly, Roots & Co."

Answered, as follows:

"Connersville, October 29th, 1866.

"Messrs. Roots & Co., If you have not bought the clover seed yet, I would rather you would hold off until I see you. I think you had better sell my lard as soon as you can, for there ain't *any bottom* to it.

Yours truly, W. H. HUSTON.

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"Cincinnati, Nov. 3d, 1866.

"W. H. Huston, Esq., Connersville, Ind.:

Dear Sir, Your favor of the 29th ult. is at hand. We have not purchased any clover seed for you and think your not purchasing for the present is very prudent. We have not sold your lard. On the receipt of your letter, lard was only worth thirteen cents; we were offered today thirteen and one-fourth cents, which may be considered the full market figure; but we are of the opinion that it will do better. If you say positively to sell, we will do so. Answer.

Yours truly, Roots & Co."

"Cincinnati, Dec. 31st, 1866.

"W. H. Huston, Esq., Connersville, Ind.:

Dear Sir, Since our respects of 3d ult., we are without any of your favors. Your one hundred tierces of lard is still on hand, unfortunately, and would not sell at over twelve cents. It is a choice article and we think should bring that figure. Please advise us whether to hold or sell. We will do either, and would be pleased to hear from you on the subject. Yours respectfully, Roots & Co."

"Connersville, Ind. Jan. 5th, 1867.

"Messrs. Roots & Co.: Gentlemen, Yours of 31st December is at hand, and in reply, I would say that on or about the 10th of last September, I ordered you to sell the lard of which you speak; since that time I have regarded it at your risk. I therefore have no instructions to give you in relation to it. Yours respectfully, W. H. HUSTON.

N. B. But I am willing to do what is right, as an honorable man. W. H. H."

We regard it as our clear duty to aid the appellant in this expressed willingness "to do what is right, as an honorable man," by an affirmation of the judgment below, with six per cent. damages added thereto in this court. This aid is sorely needed, if the postscript be as false in fact, as the body of the letter is upon its face. In the letter of the 15th of October, the appellant expressed his entire confi-

Huston v. Roots and Another.

dence in the appellees, and requested them to exercise their own judgment when to sell. The failure to answer the letter of November 3d, 1866, requesting positive instructions as to sales, seems to have resulted from a conviction on the part of the appellant that he had placed himself in a position where, if lard advanced, he might receive the benefit, and if it were sold at an additional loss, he might protect himself by the plea he has made in this case. The effect of the correspondence was to leave the sale to the judgment of Roots & Co., with a strong expression by appellant of his own opinion on the subject.

It is assigned as error, that the court did not instruct the jury as to the legal effect of the letter given in evidence of the date 29th of October, 1866.

No instructions were asked on the subject, nor would an instruction limited to that letter have been proper. No instructions are set out in the bill of exceptions. A paper is attached to the record containing what may have been instructions. It is unsigned, and there are no exceptions noted. If the construction we have placed upon the entire correspondence, had been given to the jury, it could not have aided the appellant materially.

The judgment is affirmed, with costs and six per cent. damages.

*J. S. Reid, J. C. McIntosh, S. E. Perkins, L. Jordan, and
S. E. Perkins, Jr., for appellant.*

B. F. Claypool, for appellees.

Wilson v. Hunter and Another.

WILSON v. HUNTER and Another.

VENDOR AND PURCHASER.—*Incumbrances.—Notice.*—Notice to the purchaser of real estate at the time of purchase that his vendor owes any part of the purchase money, is sufficient to put such purchaser upon inquiry as to the amount unpaid and the condition thereof as to security.

SAME.—A. sold and conveyed certain real estate to B., and took his notes for the purchase money, and a mortgage on the land to secure the same. Before the mortgage was recorded, but after the time limited therefor, B., still owing the entire purchase money, sold and conveyed the land to C., who at the time of his purchase had notice that there was due from B. to A. unpaid purchase money to a certain amount, being only a part of the actual amount, but had no notice of the mortgage.

Held, that C. could not be considered a purchaser in good faith without notice of the mortgage.

Query.—Where a purchaser, who has taken a conveyance and paid part of the purchase money in good faith, receives actual notice, before all the purchase money has been paid, of such a prior outstanding unrecorded mortgage, does the land thereby become chargeable in his hands for the whole amount due on the mortgage? And is there a distinction in this respect between a prior mortgage or other mere money incumbrance, and a prior legal or equitable title to the estate itself?

Query.—Does the vendor of real estate, by taking a mortgage thereon to secure unpaid purchase money, waive his implied equitable lien?

APPEAL from the Cass Circuit Court.

ELLIOTT, J.—This was a suit by Wilson, the appellant, against Thomas and Washington Hunter for the foreclosure of two mortgages, and to enforce a vendor's lien on real estate for the purchase money.

The facts alleged in the complaint are, in substance, as follows: On the 14th of September, 1863, Wilson sold and conveyed to Thomas Hunter, one of the defendants, a tract of land containing eighty acres, in Cass county, Indiana, for the sum of one thousand four hundred dollars, for which Hunter executed to him, of the same date, two promissory notes for seven hundred dollars each, one due December 25th, 1863, and the other December 25th, 1864, with interest from December 25th, 1863. Hunter at the same time executed to Wilson a mortgage on the same land, to secure

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the payment of the notes at maturity. The mortgage was executed in Montgomery county, Ohio, was duly acknowledged before a justice of the peace of that county, and the certificate of acknowledgment properly authenticated to admit it to record under the laws of this State, but it was not recorded in the recorder's office of Cass county until the 20th of March, 1865.

On the 11th of March, 1864, Thomas Hunter executed to one Shultz a mortgage on said land, to secure the payment of a promissory note given by him to Shultz, on the same day, for three hundred dollars, for money loaned, payable one year after the date thereof, with interest from date, waiving the appraisement laws. The mortgage was duly acknowledged, and recorded in the recorder's office of Cass county on the 15th of March, 1864, Shultz at the time of taking the same having no notice of the prior mortgage and lien of Wilson. On the 6th of April, 1864, Thomas Hunter sold and conveyed the land to his brother, Washington Hunter. The deed contains a statement that Washington was to pay the mortgage debt of Shultz.

Wilson, to protect his mortgage, subsequently purchased the note and mortgage of Shultz.

The complaint seeks a foreclosure of both mortgages, and alleges, that Washington Hunter purchased the land with full notice of the mortgage to Wilson, and also that he has not paid the purchase money to Thomas Hunter.

It is further averred in the complaint that Washington Hunter knew, at the time he purchased the land, and before he had paid any part of the purchase money therefor, that said Thomas Hunter had not paid for said land, and that the vendor of said Thomas held notes against him for the purchase money.

The defendants jointly answered by a general denial of the complaint.

Washington Hunter filed a separate answer, alleging that he purchased the land of Thomas in good faith and for a valuable consideration; that he paid therefor forty acres of

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land in Union county, valued at one thousand dollars, which he then conveyed to Thomas; that he paid, also, three hundred dollars in cash, and assumed to pay the mortgage to Shultz for three hundred dollars; that, before he purchased the land, he searched the records in the recorder's office of said county, and was informed by the recorder that there was no lien or mortgage against the land, except the mortgage to Shultz; that Thomas represented to him that the purchase money had been paid in full, &c., and that Thomas afterwards sold and conveyed the forty acres of land in Union county to a third party.

Reply in denial of the last paragraph. The answer contained another paragraph, which it is not necessary to notice in this opinion.

At the request of the plaintiff, the court, to which the cause was submitted by agreement of the parties, made a special finding of the facts, and the conclusions of law upon them, as follows:—

“1. The court finds that the defendant, Thomas Hunter, made the mortgage and two notes to the plaintiff, as set forth in the complaint.

“2. That the defendant, Thomas Hunter, made the mortgage and note to John B. Shultz, as stated in the complaint.

“3. That Shultz assigned the last named mortgage and note to John S. Wilson, the plaintiff, as stated in the complaint.

“4. That Washington Hunter bought the land so mortgaged, of Thomas Hunter, in April, 1864.

“5. That at the time Washington Hunter so bought the land, the mortgage given to plaintiff by Thomas Hunter had not been recorded.

“6. That at the time Washington Hunter so bought the land, he had notice that there was unpaid purchase money due from Thomas Hunter to plaintiff on the land, to the amount of seven hundred dollars, and that there was a note outstanding for the amount.

“7. That at the time Washington Hunter so bought the

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land, he had no notice of the mortgage so given to Wilson, the plaintiff, but had notice of the mortgage so given to Shultz.

“8. That before full payment by Washington Hunter to Thomas Hunter of the purchase money for said land, to wit, while yet there remained due from said Washinton to Thomas the sum of three hundred dollars, Washington Hunter had full notice of the mortgage given by Thomas Hunter to plaintiff, and that the same was unpaid.

“9. That after notice to Washington Hunter of the mortgage made by Thomas Hunter to plaintiff, and that the same remained unpaid, he (Washington) paid Thomas Hunter the remainder of the purchase money due from Washington to Thomas, to wit, three hundred dollars.”

Upon which findings the court declared the law to be:—

“1. That the plaintiff, by taking the mortgage from Thomas Hunter, waived his implied vendor's lien, it having thus been merged in the mortgage.

“2. That Washington Hunter having purchased the land of Thomas Hunter without notice of the mortgage given to plaintiff, and having paid for the same, all except the three hundred dollars, without notice of said mortgage, took the land independent of said mortgage, except as to said unpaid three hundred dollars, although he had notice at the time of his purchase that there was a larger amount, to wit, seven hundred dollars, still due on the land, from Thomas Hunter to plaintiff.

“3. That Washington Hunter having purchased the land of Thomas Hunter, with notice of the mortgage so given to Shultz, and also having paid to Thomas, on the purchase money, three hundred dollars, after notice of the mortgage given by Thomas Hunter to Wilson, the land remained subject to the mortgage so given to Shultz, and to the three hundred dollars so paid with notice of the mortgage given to Wilson.

“4. That as to the amount of the said mortgage given to Shultz, and the said three hundred dollars, with interest,

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&c., a decree of foreclosure should be rendered against said land."

The plaintiff excepted to the opinion of the court as to the conclusions of law arising upon the facts so found, and especially, to so much of the opinion of the court as holds that, though Washington Hunter, at the time he purchased the land, had notice that seven hundred dollars of the purchase money from Thomas to the plaintiff was unpaid, and was secured by a note; yet, as said note was secured by a mortgage, of which said Washington had no notice at the time he purchased, said sum of seven hundred was not a lien on said land, but only the sum of three hundred dollars, which remained unpaid on the purchase money from Washington to Thomas at the time Washington was notified of the mortgage of Thomas to the plaintiff.

Judgment against Thomas Hunter for the whole amount due on both mortgages, and that the amount due on the mortgage to Shultz, and three hundred dollars of the sum due on the notes and mortgage to the plaintiff, with interest thereon for twelve months, were liens on the land, and of foreclosure of said mortgage for said sums.

Three questions arise upon the conclusions of law stated by the court from the facts of the case as shown by the special findings, viz :

1. Washington Hunter having actual notice of the mortgage to Wilson before he had paid all the purchase money to Thomas Hunter, did the land thereby become chargeable, in his hands, with the whole amount due on Wilson's mortgage?
2. Did Wilson, by taking a mortgage on the land sold, to secure the purchase money, waive his equitable lien, as determined by the court?
3. Washington Hunter having notice at the time he purchased the land that there was unpaid purchase money to the amount of seven hundred dollars due from Thomas Hunter to Wilson on the land, although he had no actual notice, at that time, of the mortgage to Wilson, can he be

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considered a purchaser in good faith without notice of the mortgage?

The conclusion to which we have arrived upon the last question renders it unnecessary that we should examine or decide the first and second.

It is said in a note to *Gallion v. M'Caslin*, 1 Blackf. 91, that "notice, before actual payment of all the money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding the money be paid, is equivalent to notice before the contract." The text of the case seems to favor the same idea. The statement is copied from Sugden on Vendors, 530 (2d Am. from 5th London Ed.), to which a number of cases are cited. But in New York, where the purchaser had in good faith received a conveyance and paid part of the purchase money before notice of a prior outstanding unregistered mortgage, it was held, that the estate, in the hands of the purchaser, was only liable to the extent of the unpaid purchase money at the time of notice. *Frost v. Beekman*, 1 Johns. Ch. 288; *Jewett v. Palmer*, 7 id. 65.

Query. Is there a distinction, in this respect, between a prior mortgage or other mere money incumbrance, and a prior legal or equitable title to the estate itself?

As to the second question, it was held by this court in *Harris v. Harlan*, 14 Ind. 439, that the vendor, by taking a mortgage on the land sold, to secure the unpaid purchase money, waived the implied equitable lien therefor; that, although they are both intended to effect the same purpose, yet they cannot both exist at the same time, and for the same purpose, because they are inconsistent; that, in such case, the equitable lien is destroyed or merged in the mortgage. A contrary doctrine is held in Ohio. *Boos v. Ewing*, 17 Ohio, 500. *Neil v. Kinney*, 11 Ohio St. 58.

But, as before indicated, the case at bar will be disposed of by the decision of the third question.

The failure of Wilson to have his mortgage recorded within the time limited by the statute, did not render the

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mortgage void. It remained a valid lien on the land, as against Thomas Hunter and his heirs, and all subsequent purchasers with notice. It was a fraud upon Wilson for Thomas to sell and convey the land to Washington Hunter, without notifying him of the existence of the mortgage, and that it remained unpaid; and if Washington Hunter, by negligence or otherwise, participated in the fraud, then he cannot claim to be an innocent purchaser in good faith, and the land is still subject to Wilson's mortgage.

Mr. Sugden says, "What is sufficient to put a purchaser upon inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it. Therefore, if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice what the trust is. So, notice that the title-deeds are in another man's possession may, under strong circumstances, be held to be notice of any equitable claim which he may have on the estate, and as a security for which he held the deeds."

The doctrine on the subject is very fully discussed, and many of the cases in reference to it, both English and American, collected and reviewed, in *Williamson v. Brown*, 15 N. Y. 854, and the rule deduced therefrom stated to be, that, "where the information is sufficient to lead a party to a knowledge of a prior unrecorded conveyance, a neglect to make the necessary inquiry to acquire such knowledge, will not excuse him, but he will be chargeable with a knowledge of its existence: the rule being that a party in possession of certain information, will be chargeable with a knowledge of all facts which an inquiry, suggested by such information, prosecuted with due diligence, would have disclosed to him." The rule thus stated was repeated and approved in the subsequent case of *Fassett v. Smith*, 23 N. Y. 252; and, we think, is clearly sustained both by authority and reason. See, also, *Case v. Bumstead*, 24 Ind. 429; *Bolles v. Chauncey*, 8 Conn. 389; *Lee v. Woodworth*, 2 Green Ch. 36.

It is a familiar and well established doctrine, that a pur-

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chaser of real estate in the possession of a third person, is bound to take notice of his claim or title.

And so in *Morcland v. Lemasters*, 4 Blackf. 383, where the purchaser, at the time of the purchase, had notice that a third person was in possession of the premises, but was assured at the same time that he was only a tenant at will and had no title, it was held, that the fact of possession was sufficient to put the purchaser on inquiry, and it was his duty, under the circumstances, to make further inquiries, and to examine into the nature and extent of the occupant's interest. It was further said in that case, that the fact that a third person was a resident on the premises, was of itself, constructive notice of his claim, to all persons who might wish to purchase. But the principle is the same in both cases. The possession is sufficient to put the purchaser on inquiry, which he fails to pursue at his peril; and he is chargeable with notice of the facts which he might have ascertained by making the proper inquiry.

Here, Washington Hunter was notified at the time of his purchase, that the purchase money to Wilson had not all been paid; that at least seven hundred dollars of it, for which Wilson held the note of Thomas Hunter, remained unpaid. The facts thus disclosed to him created the legal presumption, which he knew, or was bound to know, that Wilson held a lien on the land for whatever amount of the purchase money remained unpaid. These facts were sufficient to put him on inquiry for the purpose of ascertaining the facts in relation to the amount and condition as to security, of the purchase money due to Wilson. Wilson was the proper person to apply to for that information; and it is evident that if the inquiry had been thus pursued, he would have ascertained that no part of the purchase money had been paid, and that Wilson held a mortgage on the land therefor. But he did not see fit to make the inquiry, and he must, therefore, be charged with notice of the facts which he must have discovered, had it been made. He is not, therefore, an innocent purchaser in good faith; and the

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land must be held liable for the whole amount secured by Wilson's mortgage.

So much of the decree of the court as directs a foreclosure of the mortgage to Wilsou, for three hundred dollars only, with interest on that sum for twelve months, is reversed, with costs, and the cause remanded, with instructions to the Circuit Court to render a decree of foreclosure for the whole amount due on that mortgage. The decree, in all other respects, is affirmed.

FRAZER, J.—Finding myself unable to agree with the majority of the court in this case, and deeming the question one of considerable importance, I state briefly my views upon it.

Whatever may have been held elsewhere, I suppose it may be regarded as settled in this State, that the taking of a mortgage to secure the purchase money of lands is a waiver of the implied lien upon the lands sold which equity would otherwise give. *Harris v. Harlan*, 14 Ind. 439.

Our laws for the security of mortgagees, and of purchasers also, have furnished, by the record of mortgages, a certain and convenient method for the protection of both. A mortgagee owes it to others, as well as himself, that he cause his mortgage to be recorded. Then, if a subsequent purchaser neglect to search the record and thereby learn the truth, it is his own folly, and the consequences should fall upon him, rather than upon the mortgagee who has fully performed what was incumbent upon him. If this search is not made, the purchaser takes the risk voluntarily, and cannot complain if it results in his loss. If the mortgagee chooses to keep his mortgage from the record, his negligence tends to mislead purchasers. Out of these considerations springs most rightfully an exception to the general rule, that such information as is reasonably sufficient to put one upon inquiry merely shall be deemed enough to charge him with notice of the truth as it would have been

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revealed to him if that inquiry had been made with reasonable diligence. Where the law has provided no convenient depository of notice to which all the world has access, this general rule is founded in a wise policy, and its administration tends to promote justice. But where the legislature has provided for a registry in a public office, for the very purpose of enabling all to inspect it and learn the facts, that office is the place to inquire; and the purpose of the registry acts is disregarded, if information sufficient to excite inquiry shall be held to require a purchaser to enter upon a laborious search in other and possibly distant and inconvenient places for a fact which ought to be found in the recorder's office, and would have been found there if the mortgagee had done his duty. It would have a tendency to produce carelessness and inattention as to the registry of instruments which ought to be recorded, and thereby it would to some extent defeat the policy of our legislation upon that subject. And I understand it to be settled law, therefore, that such information as is merely sufficient to put upon inquiry, is not enough to charge a purchaser with notice of an unrecorded mortgage; that the information received must go beyond that, and be such as will, without search any further, be sufficient of itself to raise a strong inference that the mortgage does exist.

In the case before us, the facts which came to the purchaser's knowledge were barely enough to put upon inquiry, and were wholly insufficient to lead to the inference that any mortgage existed.

The following authorities fully sustain the propositions of law which I have stated. The number might be greatly extended. *Dey v. Dunham*, 2 Johns. Ch. 182; *M'Mechan v. Griffing*, 3 Pick. 149; *Jolland v. Stainbridge*, 3 Ves. 478; *Wyatt v. Barwell*, 19 id. 434; *Hine v. Dodd*, 2 Atk. 275; *Jackson v. Gireen*, 8 Johns. 137; 4 Kent Com. 171-2; 1 Story Eq., § 398. The doctrine of these cases and writers was approved by this court in *Foust v. Moorman*, 2 Ind. 17. The only case which has come to my knowledge

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which is not in full concurrence with these authorities, is *Williamson v. Brown*, 15 N. Y. 354; and a careful examination of the cases cited in the opinion in that case as indicating a change in the ruling upon the subject in England and in New York, will show that those cases were wholly misapprehended. *Whitbread v. Boulnois*, 1 Y. & Col. Ex. 303, did not involve the question at all. *Grimstone v. Carter*, 3 Paige, 421, distinctly recognized the rule as disclosed in *Dey v. Dunham*. The other cases from Wendell contain some loose language, not necessarily indicating an intention to disregard what had been so long and universally held upon the subject.

D. D. Pratt and D. P. Baldwin, for appellant.

D. D. Dykeman, for appellees.

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PRACTICE.—*Instructions to Jury*.—A party having required the court to give the instructions to the jury in writing, the judge repeated orally a part of one of the charges, and in reading another charge remarked orally that he had not intended to read so far, and then re-read the charge as he intended to give it.

Held, that this was not a violation of the provision of the code, that all instructions shall be in writing if required by either party.

SUNDAY.—*Common Labor*.—*Contract*.—Where persons enter into a contract to be performed on Sunday by common labor, such contract, as to its performance on Sunday, is illegal and void.

SAME.—*Work of Necessity*.—The delivery of a quantity of flour on board a steamboat on Sunday in order to avoid the liability of delay in getting it to market occasioned by danger of the closing of navigation, is not a work of necessity.

APPEAL from the Switzerland Common Pleas.

GREGORY, J.—Suit by the appellant against the appellees on

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a contract for the sale and delivery of three thousand barrels of flour. The complaint is in four paragraphs.

The first paragraph alleges the sale of three thousand barrels of "Double Extra Montezuma Mills Family Flour" to the plaintiff, by sample, for \$28,800, paid down; that the sample was of a "superior double-extra grade of flour," known in the market at New Orleans as "Montezuma Double Extra Flour;" that the defendants undertook and warranted the bulk of said three thousand barrels of flour to correspond with the sample; that the three thousand barrels of flour which they delivered were not of a grade and quality of flour corresponding with the sample, but were inferior, to wit, only superfine; that the same were worth three dollars per barrel less; whereby plaintiff suffered six thousand dollars damages.

The second paragraph alleges a purchase by the plaintiff of three thousand barrels of flour for \$28,800, paid down, which the defendants agreed to deliver on board the steam-boat Peytona, at the wharf in the city of Madison, on the 15th of January, 1865; that the defendants knew plaintiff had contracted with said steamer, that she would arrive January 15th, 1865, and that the flour was expressly purchased for shipment to, and sale in, the New Orleans market; that the defendants did not deliver the three thousand barrels of flour, but only one thousand barrels, at the time agreed upon, and did not deliver the balance till long after; that the price of flour fell three dollars per barrel in the interim, which the plaintiff lost; that the plaintiff was compelled to pay the owners of the steamer Peytona three hundred dollars for not furnishing the freight, that is, the additional two thousand barrels not delivered.

The third paragraph is like the first and second, *i. e.*, it alleges that the contract of warranty and delivery was one.

The fourth paragraph alleges, that the plaintiff had purchased and paid \$28,800 for three thousand barrels of flour, and that the defendants agreed to deliver the same at the wharf in the city of Madison in time to ship the same upon

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the steamboat Peytona, which the plaintiff had engaged to transport the flour; that the flour was purchased expressly for shipment upon said steamboat to New Orleans, but that the exact time of her arrival was unknown; that the defendants, were fully informed of the objects of the purchase; that at the time of the purchase the weather was very cold, and there was great probability that navigation in the Ohio river would be closed with ice in a short time, and that the contract of delivery was made with reference to the state of the weather and stage of the river at that time; that said steamboat arrived at the wharf at Madison on the 15th day of January, 1865, and the plaintiff was ready and willing then and there to receive the flour, but the defendants refused to deliver two thousand barrels of the same; that after the departure of the Peytona the river closed with ice, and the plaintiff was unable to ship the balance of the flour till a long time afterward.

This paragraph contains the same allegations with regard damages as the other paragraphs.

The defendants answered: first, general denial; second, as to the contract to deliver, that they had no notice of the arrival of the Peytona until the evening of January 14th, 1865; and that the 15th (the next day) was Sunday, and they were not obliged to deliver the flour on that day; that they commenced to deliver the flour at midnight of the last named day, and that the steamer Peytona left after receiving one thousand barrels; third, that the defendants were commission merchants, and did not own the flour; that they accounted for the flour before notice.

The plaintiff replied by the general denial. Trial by jury; verdict for the defendants; motion for a new trial overruled, and judgment.

There are a number of questions argued by the appellant's counsel. As the verdict was for the defendants, all the questions on the evidence and the instructions of the court as to the measure of the damages become immaterial.

The judge was required by the appellant to give the

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charges to the jury in writing. The court *repeated* orally a part of one of the charges. In reading another charge, the judge remarked orally, that he had not intended to read so far as he had, and then re-read the charge as he intended to give it. It is claimed that this is a violation of the provision of the code requiring all instructions to be in writing when it is required by either party. We hold that there was no error in the action of the court. The instructions were not modified or changed by any oral charge, but they went to the jury as they were written.

At the request of the appellees the court charged the jury as follows:—

“When parties enter into a contract to be performed on Sunday by the common labor of the party required to perform, and his employees, the contract as to performance on Sunday is illegal and void, and neither of them can maintain an action against the other arising out of said contract in respect to its non-performance on Sunday.”

The appellant asked the court to charge the jury as follows:—

“Work and labor on Sunday are prohibited by statute, except in cases of charity or necessity. If you find from the evidence that negotiations were being made between the plaintiff and defendants for the purchase of three thousand barrels of flour, for the purpose of shipping the same to New Orleans; and if you further find that in anticipation of the completion of said purchase the plaintiff engaged the steamer Peytona, when she should come to Madison, to take said flour on board, and transport the same to New Orleans; and if you further find it was uncertain, at the time of engaging such boat, when she would arrive at Madison; and if you further find that on the 14th day of January, 1865, said plaintiff purchased and paid for said flour, and closed said negotiation, and that the said steamer Peytona had notified the parties that she would be at Madison on Sunday, the 15th of January, 1865; and if you further find from the evidence that there was actual danger, at

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the time, of navigation closing soon, on account of the state of the weather; and if you further find that at the said time the water in the Ohio river was falling fast, and that a delay of the said boat over to and during Monday, the 16th of said month, would endanger her passage over the falls at Louisville, Ky., and leave her in danger of becoming ice-bound in said river; and if you find from the evidence that said steamer was too large to pass through the locks around said falls; and if you further find that on account of the foregoing matters (if the same be found by you) the defendants, at the time of said contract of sale above referred to, agreed to deliver said flour at the wharf, to said steamer, at Madison, on Sunday, the 15th day of January, 1865; then it is a question for you to decide whether such delivery of the flour was not a matter of necessity, under all the circumstances of the case. The necessity cannot arise for the mere convenience of a party; nor can it be founded on mere pretense; but must arise from the action of the elements, or upon some contingency not occurring in the ordinary transactions of business. And a necessity may be justified in the management, protection, or disposition of property, the value of which in market or otherwise may be greatly endangered by action and operation of the elements; and, if in this case a real necessity for the delivery on that day existed, the defendants were bound to deliver the flour on that day, if they agreed to do so, as above stated."

The court refused to give the charge, and the appellant excepted.

If it is illegal to make a contract on Sunday, it certainly is illegal to contract to perform one requiring common labor on that day. We think the true rule and the reason for it are recognized and stated in *Perkins v. Jones*, 26 Ind. 499.

If the vicissitudes of trade and speculation were allowed to fix the rule as to what are works of necessity, there could be no observance of the Sabbath. There are, as a general

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thing, dangers attending every enterprise, which may be avoided by expedition; but the Sabbath is not the day for common labor although by such labor dangers may be avoided.

We think the court below put the case properly to the jury.

We have looked through the evidence, and think there was no testimony tending to prove a contract to deliver the flour on Sunday. In the absence of such a contract, it is clear that performance cannot be demanded on that day, on the ground that a delay would subject the obligee to liability to pecuniary loss. The cases cited by the counsel for appellant do not meet this case.

In *Logan v. Mathews*, 6 Penn. St. 417, it was held, that the visiting of his father by the defendant was a discharge of a filial duty, which nothing in the law hindred or forbade.

The ruling in *Commonwealth v. Knox*, 6 Mass. 75, was put on the ground, that the defendant had contracted with the postmaster general, under an act of Congress, to carry the mail on Sunday, and that by the Federal Constitution, laws made in pursuance thereof are declared to be supreme laws of the land, and to be binding on the judges in every state in the Union.

In *Flagg v. The Inhabitants of Millbury*, 4 Cush. 243, it was held, that when a defect in the highway is discovered on the Lord's day, which may endanger the limbs and the lives of travellers, it is not only morally fit and proper that it should be immediately repaired, but it is the imperative duty of the town, which is bound to keep the highway in repair, to cause it so to be done, or to adopt means to guard against the danger until it can be done.

In the case under consideration, liability of delay in getting the flour to market was the only thing involved. There was no filial duty to be performed; there was no supreme law of the land requiring and making the act lawful; life and limb were not endangered by the omission to do the work demanded. There was no moral fitness in requiring

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the appellees to do the work of delivery on the Sabbath for any purpose involved in the transaction.

If the steamer in this case could lawfully demand to be freighted on the Sabbath, we know of no legal reason that would prevent any boat on the Ohio river from making a like demand.

There was no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

H. W. Harrington and C. A. Korbly, for appellant.

C. E. Walker, for appellees.

HAMILTON v. THE CITY OF NEW ALBANY.

CITY.—Cemetery.—Pleading.—Title.—Complaint against a city, averring that the defendant had within her limits a cemetery, in which she required all interments in said city to be made, and of which she had sole control; that she conveyed a lot therein to plaintiff, subject to her supervisory care, within which lot he interred the body of his deceased child; that subsequently, without his knowledge or consent, the sexton of said cemetery, appointed by the defendant and under her control, removed said body to a lot used as a common burial ground, to the damage, &c. Answer, that at the time of the trespass charged, and for a long time prior thereto, one A., a third person, was and had been the owner of said lot, and was in possession thereof, and that the removal was made under his authority, in good faith, with care and decency.

Held, that the answer was good on demurrer, without showing from whom or how A. acquired title.

SAME.—Damages.—Proof was made on the trial, that two years before the cause of action accrued, the plaintiff having years before removed from the city, the latter, by mistake, sold and conveyed to A. the cemetery lot theretofore sold to plaintiff; that when about to inter a corpse in said lot at A.'s request, the sexton discovered the box containing the remains of plaintiff's child, and carefully removed the box and buried it in a place set apart for single graves, of which the plaintiff had no knowledge till he sent his wife to remove the body of the child to another city, the plaintiff's place

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of residence. No special damages and no expenses incurred were shown. Finding for the plaintiff, with nominal damages, which this court refused to disturb.

JURISDICTION—*Title to Real Estate.*—Where a judge of the common pleas court, considering the question of the title to real estate as involved in a cause in that court, orders the transfer of the cause to the circuit court, the ruling is final.

HARMLESS ERROR.—*Demurrer.*—In an action in which the plaintiff recovered, a demurrer filed to an answer alleging a compromise of the cause of action before suit brought was overruled.

Held, that, as the answer could not reduce the damages awarded the plaintiff, if there was error in the ruling it was not available on appeal.

SAME.—*Evidence.*—Evidence of a contract with the plaintiff's wife to compromise the cause of action was admitted, but the finding was against any such contract.

Held, that the admission of this evidence could not reverse the judgment.

APPEAL from the Floyd Common Pleas.

RAY, C. J.—The appellant brought his action against the city of New Albany, charging in the first paragraph of his complaint, that said city had within her corporate limits a cemetery within which she required the bodies of all persons dying in said city to be buried; that she had sole control of said cemetery; that she conveyed a lot thereto to the appellant subject to her supervisory care, within which lot he interred the body of his deceased child; that subsequently and without his knowledge or consent, the sexton of said cemetery, appointed by said city, and under her control, removed said body to a lot used as a common burial ground, to the damage, &c.

The second paragraph of the complaint contains the further averment, that subsequent to the purchase by appellant of said lot, and after the burial therein of his said deceased child, the city wrongfully sold and conveyed the same lot to one Featheringill, and thereupon removed the said body.

A general denial was filed, and also a second paragraph of answer to the first paragraph of the complaint, in which it was alleged that at the time of the trespass charged, and for a long time prior thereto, one Featheringill was, and

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had been, the owner of said lot, and was in possession thereof, and said removal was made under her authority, in good faith, and with care and decency. A general denial was filed to the second paragraph of the complaint, and a second paragraph of answer, to the same effect as the one above set out. A demurrer was filed and overruled to each of the special answers. As the answers expressly alleged the ownership of the lot at the date of the trespass to be in Mrs. Featheringill, and that the act complained of was done under her authority, we regard them as good on demurrer. The city was not bound to trace Mrs. Featheringill's title to the lot, or show from whom or how she acquired it, whether directly by deed from the appellant, or not. Under the averment of title in Mrs. Featheringill, the appellee could introduce such proof as would sustain that issue.

The Common Pleas Judge, considering the title to the lot in question as involved by this paragraph of the answer, ordered the transfer of the case to the Circuit Court, to which the plaintiff excepted. As the act of 1859, page 93, declares the ruling of the Common Pleas Court on the transfer of a case final, we do not discuss this error assigned.

The defendant, at a subsequent term of the Circuit Court, by leave, filed an additional paragraph, alleging a compromise with the plaintiff of the cause of action before suit brought. A demurrer was overruled to this paragraph. As the plaintiff recovered in the action, and this paragraph could in no way reduce his damages, we do not see that any harm could have resulted from this ruling of the court. If there was error it could not reverse the case. The same remark will apply to the admission on the trial of proof of a contract with the wife of the plaintiff to compromise the cause of action. The finding of the jury was against any such contract, and the admission of the evidence could have resulted in no injury to the plaintiff.

There are objections made to several of the charges given by the court to the jury, but as the charges as given by the

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court are not stated in the abstract, as required by our rule, we do not examine them. The finding was for plaintiff, with one cent damages. There was proof that two years before the cause of action occurred, the plaintiff having years before removed from the city of New Albany, the city did, in fact, under a mistake, sell and convey to Featheringill the lot theretofore sold to the plaintiff; and that when about to inter a corpse in said lot at the request of said purchaser, the sexton discovered the box containing the remains of plaintiff's child, and carefully removed the box and placed it in a place set apart for single graves. It was also in proof that the plaintiff had no knowledge of this until he sent his wife to New Albany to remove the body of his child to Madison, the place of his present residence. There were no special damages shown or expenses incurred, and we do not feel at liberty to disturb the finding of the jury which gave the appellant nominal damages.

The judgment is affirmed, with costs.

J. H. Stotsenburg and T. M. Brown, for appellant.

G. V. Howk and R. M. Weir, for appellee.

RIDENOUR and Others v. WHERRITT.

TRUSTS AND TRUSTEES.—Suit for a breach of duty by defendants as trustees, in surrendering and allowing to be canceled certain bonds executed by a railroad company and held by defendants in trust to secure the repayment of certain sums advanced to the company by a town, the plaintiff's assignor. *Held*, that the railroad company was not a necessary party defendant.

Held, also, the contract by the town with the company not being prohibited by any statute, that the mere lack of power in the town to loan money could not be taken advantage of by the borrower, or by the defendants.

Held, also, that an acceptance of the trust in writing by the trustees was not necessary to fix their liability.

SAME.—Damages.—The complaint showed that the company was in default by

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a violation of its agreement to apply the net earnings of the road to the liquidation of the debt assigned to the plaintiff, and that the plaintiff was injured by the wrongful act of the defendants in a certain amount.

Held, that the complaint was not defective for not alleging that the debt from the railroad company was due, and a failure to pay.

PRINCIPAL AND AGENT.—Reimbursement of Agent.—An indebtedness of a railroad company to a town was assigned in writing to one who purchased with his own money, but was acting at the time as the agent of the company.

Held, that the company could not have the benefit of the purchase without an offer to pay, and that it was immaterial in what light the town council regarded the transaction.

APPEAL from the Fayette Common Pleas.

GREGORY, J.—Suit by Wherritt against Ridenour, Roots, and Claypool, for a breach of duty as trustees, in surrendering and allowing to be canceled certain bonds executed by the Junction Railroad Company, held by them for the use of, and in trust for, the plaintiff's assignor, to secure the repayment of certain sums advanced to the railroad company. A demurrer to the complaint was overruled, and this is assigned for error.

It is objected to the complaint, that the railroad company was not made a party defendant. There is no force in this objection. The liability of the trustees to the plaintiff, as assignee of the town of Connersville, for the breach of duty complained of, was disconnected with any liability of the railroad company.

It is claimed that the contract with the town of Connersville under which the money was advanced is void, on the ground that the town had no power under its charter to loan money. The contract is not prohibited by any statute. The mere lack of power in the town to loan money could not be taken advantage of by the borrower, nor could it avail these defendants. The case is not within the rule, that contracts prohibited by statute will not be enforced by the courts.

It is urged that, as there was no acceptance of the trust in writing, there is no liability on the trustees to answer for

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the debt of another. The liability arises out of a violation of duty resting upon the trustees themselves, and not to answer for the debt of the company.

It is claimed that the complaint is defective, for not showing that the debt from the railroad company was due, and a failure to pay. The complaint does show that the railroad company was in default by a violation of its agreement to apply the net earnings of the road to the liquidation of the debt. And, moreover, it is shown that the plaintiff was injured by the wrongful act of the defendants to the amount of recovery.

The next question arises on the action of the court below in sustaining a demurrer to certain paragraphs of the answer.

The plaintiff purchased the claim sued on with his own money, but was acting at the time as the agent of the railroad company. The paragraphs demurred to do not show an offer to pay the agent. There is a paragraph, upon which an issue was formed and found against the appellants, in which the agency is averred and a tender of the amount paid. We hold that the issue tried fairly presented the question of agency. If the plaintiff used his own money in the purchase, the railroad company cannot have the benefit thereof without an offer to pay.

It is immaterial in what light the town council regarded the transaction. The assignment was in writing and made to the plaintiff.

The judgment is affirmed, with costs.

J. S. Reid and B. F. Claypool, for appellants.

J. C. McIntosh, for appellee.

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VOORHEES AND WIFE v. HUSHAW and Others.

DEMURRER.—A demurrer to a part of a paragraph of a complaint is not permissible under the code.

SAME.—*Defect of Parties.—Partition.*—The objection to a complaint in partition that it discloses the fact that a certain portion of the lands sought to be divided is owned by the plaintiffs and defendants in common with a person whose name is not given, or any reason for not disclosing it, if a valid one, is waived if not taken by demurrer for that particular cause.

ESTOPPEL.—*Conveyance.—Consideration.*—A., the owner of certain real estate, voluntarily refused to pay the taxes thereon, and designedly permitted it to be returned as delinquent, and to be sold for taxes, and procured B. to buy it in at such sale, and to assign the certificate of purchase to the daughter of A., and procured the county auditor to convey the land to said daughter under the certificate, with the intent, in consideration of natural love and affection, to thereby invest her with the title to the land as a voluntary and absolute gift, and not as an advancement.

Held, in a suit, after A.'s death, against said daughter by the other heirs at law of A., for partition of said land, that these facts did not estop the plaintiffs from denying the validity of the sale for taxes or the title of the daughter under it.

APPEAL.—*Record.*—A pleading having been once copied into the record made out on appeal, it is not necessary to copy it again when introduced into subsequent parts of the record; a reference to it by which it can be identified being all that is necessary.

APPEAL from the Fountain Circuit Court.

Suit by the appellees against the appellants and others for partition of the lands of Solomon Hushaw, deceased, of whom the plaintiffs and defendants were the heirs at law.

Among other averments, the complaint alleged that Solomon Hushaw, a short time before his death, procured a tax deed for about eighty acres of the lands sought to be partitioned to be made to his daughter Rebecca, one of the appellants; and charged that the sale for taxes was illegal, and that said deed vested no good title in said Rebecca. To this part of the complaint the appellants filed a demurrer, which was overruled.

It is urged in this court by the appellants, that the complaint was insufficient because it disclosed that one of the tracts sought to be divided was owned by the plaintiffs and

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defendants in common with a person whose name was not given, or any reason for not disclosing it.

The appellants answered by the general denial and four special paragraphs.

The third paragraph was withdrawn, and demurrers to the second, fourth and fifth paragraphs were sustained.

Trial by the court; finding for the plaintiffs; partition ordered; and commissioners appointed, to whose report the appellants objected. The objection was overruled, and partition was made in accordance with the report.

ELLIOTT, J.—The first question urged by the appellants for a reversal of the judgment is, that the complaint is bad. But they have failed to furnish such an abstract of the complaint as to present the question, and we are not required, therefore, to examine it. It may, however, be proper to remark that the complaint is in a single paragraph, and a demurrer was filed to a part of it, which was correctly overruled, and might properly have been stricken out or rejected, as a demurrer to a part of a paragraph of a complaint is not permissible under the code. *O'Harer v. Shidler*, 26 Ind. 278.

The objection urged to the complaint, in argument, if a valid one, is of such a character as must have been taken by demurrer for that particular cause, and not being so taken, was waived.

It is also insisted, that the court erred in sustaining the demurrers to the second, fourth and fifth paragraphs of the appellants' answer.

The fourth paragraph sets up a claim of title in the appellant Rebecca Voorhees by a parol gift by her father, and is so obviously bad that no argument is presented in defense of it.

The second and fifth paragraphs are substantially the same, and may be examined together. By these paragraphs the appellants claim title in Rebecca Voorhees to a part of the land described in the petition for partition, by virtue

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of a conveyance made to her by the county auditor, under a sale thereof for taxes. It is not contended by the appellants' counsel, in argument, that the averments in either of the paragraphs are sufficient to show a valid sale and conveyance of the land for taxes; but it is urged that, under the facts alleged in these paragraphs, the appellees are estopped from denying the validity of that title. The facts relied on as working an estoppel are, that Solomon Hushaw, the father of said Rebecca, and under whom all the appellees claim title, being the owner of the land, voluntarily refused to pay the taxes thereon, and designedly suffered and permitted it to be returned as delinquent, and subsequently sold for taxes, and procured Furguson to purchase it in at such sale; and that he afterwards procured Furguson to assign and transfer his certificate of purchase to said Rebecca, and also procured the county auditor to convey the land to her under said certificate, with the intent and purpose, and in consideration of natural love and affection, thereby to invest her with the title to the land as a voluntary and absolute gift, and not as an advancement.

The facts alleged do not, in our judgment, estop the appellees from denying the validity of the sale for taxes, or the title of Rebecca under it.. Natural love and affection constitute a sufficient consideration to support a conveyance, otherwise valid, made, or procured, by a father to his child, or an executed gift, but not sufficient to support an executory promise; nor will such a promise be enforced either at law or in equity.

Estoppels intervene to prevent fraud and wrong; thus, a party will be concluded from denying the truth of his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, when such denial will operate to the injury of the latter; for, in such a case, in good conscience and honest dealing, he ought not to be permitted to make such denial. See *Ridgway v. Morrison*, 28 Ind. 201, and cases there cited.

Here, it does not appear that the appellant was influenced

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to any act by the promise, acts, or statements, of her father; indeed, it is not shown that she did anything; she paid nothing for the conveyance, parted with no right, and in nowise changed her condition. She was simply passive and received the conveyance when it was made to her.

If she fails to hold the land, she is placed in no worse condition than she would have been if all her father did in reference to the matter had never transpired. She may fail in an expected benefit, which she supposed was voluntarily bestowed upon her; but it cannot, in any legal sense, be said that she is injured.

We think the court did right in sustaining the demurrs to the second, fourth, and fifth paragraphs of the answer.

It is claimed that no demurrer or reply was filed to the second paragraph of the answer, and that it remains undisposed of. We do not so understand the record. It first shows that a demurrer, which is set out, was filed to that paragraph, and overruled; the plaintiffs then replied, but afterwards withdrew the reply, by leave of the court, and "refiled the demurrer;" afterwards the demurrer was withdrawn to enable the plaintiffs to file a motion in reference to the paragraph. The motion having been disposed of, the record shows that the demurrer was "refiled" and sustained. The pleading having been once copied into the record made out on appeal, it was not necessary to copy it again when introduced into subsequent parts of the record; a reference to it by which it can be identified is all that is necessary.

Overruling the appellants' objection to the report of the commissioners who made the partition, is the only remaining question presented.

The objections to the report are based on a misapprehension of the facts stated in it.

Among the lands to be partitioned were the west half of the north-east quarter of section twenty-three, in township twenty-one, north of range seven; the north half of the west half of the south-east quarter of the same section; and

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four undivided sixths of the south half of the last named tract.

It will be observed that the two half-quarter sections adjoin each other; the one first described lying immediately north of the latter. One objection urged to the report is, that whilst the first described tract only contains eighty acres, shares amounting to one hundred and forty-seven acres are assigned out of it, leaving the last described tract undivided or assigned. The objection is not true in point of fact. The commissioners commenced the partition of these lands, by first assigning to Joseph Hushaw thirty-seven acres, across the north end of the west half of the north-east quarter of the section. Then to Anna Houver twenty-eight acres adjoining that assigned to Joseph, on the south. These two shares, it will be observed, leave fifteen acres of that tract. Next follows the share assigned to Margaret Hushaw, which is described in the report thus: "Twenty-eight acres in the west half of the north-east quarter of section twenty-three," &c., "and in the north part of the north-west quarter of the south-east quarter" of the same section, "adjoining the share assigned to Anna Houver, on the south." Next is assigned to Rebecca Voorhees, the appellant, "twenty-seven acres in the west half of the south-east quarter" of the section, "adjoining the share assigned to Margaret, on the south." This share just embraces the residue of the north half of the west half of the south-east quarter of the section, not included in that assigned to Margaret. And to Louisa Hershberger is assigned twenty-seven acres more or less, in the same half quarter section, adjoining the share assigned to Rebecca, "and embracing the residue of said eighty-acre tract, except the six and two-thirds acres across and off the south end of the same, heretofore assigned William S. Coon, and except the undivided interest in said twenty-seven acres belonging to another." The parties to this suit were the owners of only four-sixths of this forty-acre tract; one-sixth was owned by Coon, and the report shows that it had been

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previously assigned to him—six and two-thirds acres, across the south end of the tract; the other sixth belonged to some one whose name is not given; and the assignment to Louisa covers the forty acres, except that assigned to Coon, but subject to the sixth owned by the person not named, which would leave to her about twenty-seven acres.

The objections to the report were not well taken, and were therefore properly overruled.

The judgment is affirmed, with costs.

GREGORY, J., having been of counsel, was absent.

D. W. Voorhees, J. Ristine, T. F. Davidson, and J. M. Butler, for appellants.

S. C. Willson, W. H. Mallory, and J. McCabe, for appellees.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1869, IN THE FIFTY-THIRD YEAR
OF THE STATE.

HEATH v. WILLIAMS.

MORTGAGE.—CONDITIONAL SALE.—Construction of.—Evidence.—It is settled in this State, that parol evidence is admissible to aid in distinguishing between a conditional sale and a mortgage.

SAME.—In a case of doubt, equity will construe a writing as a mortgage rather than a conditional sale.

SAME.—On the 25th of March, 1858, J. H. and B. W. executed the following instruments, the land therein mentioned having been conveyed by B. W. to D. H. on the 24th of February, 1858, by a deed absolute on its face: "This is to certify that I am to make, or cause to be made, a deed for 360 acres of land in Benton county, Indiana, the land B. W. sold to me for D. H., on the payment of all money to said D. H. that he pays on said land; that is, if the money is paid on or before the 23d of February, 1859. (Signed) J. H." "This is to certify that I, B. W., sold to J. H. for D. H., on the 23d day of February, 1858, 360 acres of land in Benton county, Indiana, for \$5,400; and I agree to receive all receipts, where money is paid for claims against the land, as payments on the above land mentioned; and I agree to take a note B. B. & Co. hold against me in payment on said land; and I give full possession from day of sale. (Signed) B. W. Received on the above land \$1,007.67. (Signed) B. W."

Held, upon these writings and parol evidence showing that the conveyance was intended to be a security for the payment of money, that the transaction was a mortgage.

APPEAL from the Tippecanoe Circuit Court.

RAY, J.—This was an action by David Heath against

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Barton Williams, to quiet the title to certain lands. The complaint alleges, in substance, that on the 24th of February, 1858, Williams sold and conveyed to him by warranty deed in fee, three hundred and sixty acres of land; that he went into immediate possession of it, and made lasting improvements thereon, &c.; but that Williams claimed the conveyance to be only a mortgage, and threatened suit for redemption, &c. Prayer, that the plaintiff's title should be quieted, and for general relief. This suit was brought in Benton county, where the land lies, and on plaintiff's application the venue was changed to Tippecanoe county.

Williams files an answer and cross-complaint, alleging, substantially, that the conveyance to plaintiff was intended by the parties to be wholly in the nature of a mortgage, and not an absolute deed; that at its date he was indebted to Joseph Heath, the plaintiff's son, by a note made in 1856, for seven hundred dollars, and to divers other persons in different sums, making an aggregate of debts of four thousand nine hundred and thirty-two dollars; that it was agreed between him and Joseph Heath, who was acting for himself and as plaintiff's agent, that a deed, absolute on its face, but really a mortgage, should be made of the lands to David Heath, to secure Joseph's debt and such other debts as they should pay for Williams, and that a written agreement should be given by Joseph, as such agent, securing the right of redemption upon the payment of his debt and such other sums as might be paid by either of the Heaths on Williams' account, with twenty-five per centum per annum interest thereon. Williams further alleges, that when the deed was made it was agreed that he should have until the 23d of February, 1859, in which to redeem the land, which agreement was reduced to writing, but which writing had been lost; that Joseph Heath was embarrassed with debts, and could not hold lands, and so they were conveyed to the plaintiff, his father, who took and held them in trust for Joseph, the latter having moved upon and occupied them for several years; that their rents had been enjoyed by the

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plaintiff and his son, and were of the value of five thousand dollars; that waste had been committed by them on the lands to the amount of two thousand dollars; that he, Williams, had labored for them on the farm, on account of said debts, to the amount of one thousand dollars; and the parties had embarked in a cattle adventure, the profits of which were five thousand dollars, and by agreement one-fifth was to belong to Williams and be applied to the said debts. Prayer for an account and redemption of the land. The cross-complaint was verified by affidavit, and Joseph Heath was made a party defendant and voluntarily appeared. A demurrer to this answer and cross-complaint was overruled, but as no point is made upon the questions raised by this ruling in the appellant's brief, we treat it as waived.

The appellant answered the counter-claim in three paragraphs:

1. A general denial.
2. "He says he purchased said lands described in the counter-claim and received a deed for the same; that said sale was a conditional one, the conditions being fully set out in a written memorandum as mentioned in said counter-claim, but said Williams never complied or offered to comply with said conditions; but the plaintiff says the substance of said written memorandum is not correctly stated in said counter-claim, and when it is produced it will show that said sale was a conditional one, and not a mortgage transaction; and that said sale has become absolute by the failure of said Williams to comply with the conditions to be performed by him."

3. That when the lands were conveyed to plaintiff it was supposed they were worth more than the agreed price, and it was agreed that if Williams could sell the lands within a year at an advance, he should be at liberty to do so, and a conveyance should be made to the new purchaser; that shortly afterward a written memorandum was made of this

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conditional arrangement, by which it will be seen that said sale was a conditional one, but the conditions were never complied with by Williams; that plaintiff took possession of the land, made improvements thereon, &c., but that no profits from its use were ever realized. An itemized account of debts paid, improvements made, &c., is set out, and this paragraph is framed with a view to an account, in the event of the transaction being found to be a mortgage. Joseph Heath adopted his father's answer.

To the second and third paragraphs of these answers replies were filed by Williams, denying the same, except so far as they admitted the allegations of the answer and cross-complaint. The issues thus made, it will be seen, are as follows:

1. Plaintiff asserted that he had a fee simple absolute title in the lands. The defendant, Williams, denied it, and said he only had a mortgage upon them.

2. Plaintiff asserted that the sale and conveyance to him, plaintiff, were conditional, and that if the money advanced by him upon the lands was not refunded by Williams by a resale of them or otherwise within a year, then the sale was to be absolute, and he having failed to refund in that time, had lost all right. Williams denied this, and insisted upon his answer and cross-complaint, which sets up that the transaction was only a mortgage.

3. Issue upon accounts as to amount necessary to redeem.

These issues were tried by a jury, who found that the transaction was a mortgage, and on the payment to the plaintiff by Williams of three thousand three hundred and seventy-five dollars he would be entitled to a reconveyance of the land.

Motions for a new trial and for judgment for plaintiff *non obstante veredicto* were overruled, and final decree for Williams, that on payment of the sum found due by the jury the land should be reconveyed to him, and in default of such payment the land should be sold without relief, &c., to pay the same, and taxing costs against the plaintiff.

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On the trial, it was admitted that the only title of the plaintiff or of Joseph Heath was derived under the defendant Williams by a deed absolute on its face, and a copy of which is made a part of the cross-complaint by said defendant. It was also admitted that the acts and admissions of Joseph Heath should be proved, and have the same force and effect as though they were the acts and declarations of the plaintiff.

Barton Williams, the defendant, testified that on the 24th of February, 1858, he owed Joseph Heath a note for seven hundred dollars, for money advanced to him some time before, to purchase cattle; the note, with the interest, amounted to seven hundred and forty-four dollars. He was also indebted as follows:

To E. C. Sumner.....	\$ 700.00
“ Philip Williams, by judgment,.....	275.00
“ Barbee, Brown & Co., upwards of.....	600.00
“ Jane Williams, his mother, for dower in farm,	400.00
“ Jacob Harman, due June, 1858,.....	1,800.00
“ Isaac Lewis, about.....	\$70.00 or 75.00
“ Lewis & Ladd, on account,.....	120.00

About the 22d of February, 1858, he returned home from New York, and found Joseph Heath at his house. Heath said he had come for his money. Williams told him he would have it soon. Heath replied that he *wanted it*. Williams stated that he was in a tight place. Heath then told him that he had a little money, and if Williams would make him safe he would help him. Williams agreed that if he would advance him enough to make his indebtedness to him, with the note, one thousand dollars, he would pay twenty-five per cent. interest. Two instruments in writing were handed to the witness, which are as follows:—

“March 25th, 1858. This is to certify that I am to make, or cause to be made, a deed for three hundred and sixty acres of land in Benton county, Indiana, the land that Barton Williams sold to me for David Heath, on the payment of all money to said David Heath that he pays on said land;

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that is, if the money is paid on or before the 23d day of February, 1859.

JOSEPH HEATH."

"This is to certify that I, Barton Williams, sold to Joseph Heath, for David Heath, on the 23d day of February, 1858, 360 acres of land in Benton county, Indiana, for five thousand four hundred dollars. And I agree to receive all receipts, where money is paid for claims against the land, as payments on the above land mentioned. And I agree to take a note Barbee, Brown & Co. hold against me in payment on said lands. And I give full possession from day of sale.

BARTON WILLIAMS.

"Received on the above land \$1,007.67.

"BARTON WILLIAMS."

The witness admitted these instruments as originals, and continued: At the time the deed was made (which was a deed in fee simple), some twenty-five or thirty dollars were paid, and the balance was to go on the debt to Heath, and judgments, &c., in Oxford. Joseph Heath moved on the farm in April, 1858, and Williams went to work for him on the 15th of June following, and continued there at work until April 8th, 1860. Joseph Heath stated that there was a judgment against him, and the deed would have to be made to his father, who lived in Ohio, and who frequently came to the farm. The farm was a stock farm and in good condition, with one hundred and forty-five acres in cultivation for plowing, and one hundred and eighty acres in blue grass pasture, well set, and with good water running through it. It was worth twenty-five dollars per acre. At the time the deed was made there were one hundred and thirty acres of good rail timber on the farm. Williams' labor was to be applied on improvements or indebtedness, and was worth one dollar per day. Heath had from one hundred to two hundred head of cattle on the farm all winter. Heath hauled away about one thousand four hundred rails. He also took two hundred and twenty panels of rails belonging to Williams, which were on the other land, also three

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hundred and forty panels between the John Williams farm and the defendant's—in all fourteen thousand seven hundred and forty. There were also rails cut from timber on the land, worth seven dollars per hundred, in amount some six thousand four hundred and twenty-three dollars, and half a mile of fence, four thousand two hundred and fourteen rails, part of which went to build a fence on other lands, and worth eight to nine dollars per hundred. Williams had made arrangements to get the money to pay Heath from E. C. Sumner, and in January, 1859, he told Heath he wanted to settle with him, as the time was about out. Heath answered, "Never mind, we can fix that some other time." Heath was going to Illinois, and said he had not time to settle, but would make it all right, and they would wait till fall, and he would sell his cattle, and fix it up. In the fall, when the water gave out at Parish's Grove, Williams went and herded the cattle day and night about a month. When the cattle were about all gone, Williams again applied for a settlement, but Heath told him not to be uneasy, and he would pay him double wages for what he did for him. In the spring of 1860, Joseph Heath proposed that Williams should go with him and his father to Illinois and buy cattle and herd them, and Williams should have the profit on fifty head. They went to Illinois and purchased three hundred and forty-three cattle, and brought them home in June, and Williams herded them till the middle of September. Old man Heath seemed, from his conversation, to understand the arrangement in regard to the cattle, and told Williams, the better care he took, the more money they would make. The lot of three hundred cattle made a profit of four thousand dollars. The share of Williams was to go on the indebtedness. Heath never denied Williams' right to redeem the farm until the summer of 1860, when Williams was herding cattle, when he talked about keeping the farm, and Williams told him he would have it out with the old man about that. When the deed was made Williams proposed a mortgage, but Heath said he would rather have a

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deed, and then if he had to pay any more money than the one thousand dollars, it would make him secure. Williams replied that he had borrowed money by a trust deed, as he understood it was called, and he could do it again. Heath was to make a deed back in 1859. Williams took up his note for seven hundred and forty-four dollars, and the balance of the one thousand dollars was paid on judgments, and the Barbee, Brown & Co. note was paid in 1860. It was never surrendered to Williams. The Harman debt was a note and mortgage on the land, five hundred dollars of which was paid in 1860, some more five or six months after, and the balance in 1861. When the first five hundred dollars was paid, Williams was present and told Heath not to pay it, as he would have no more to do with it, for he (Williams) would pay it himself. Heath drew the writings of March 25th, 1858.

The cross-examination contains the following:—

Question. "How much was paid when the deed was made?"

Answer. "\$1,007.00."

Q. "Was your agreement at that time put in writing?"

A. "No, not till afterwards."

Q. "Is the signature of Barton Williams to the papers dated March 25th, 1858, now handed you again, genuine?"

A. "Yes."

Q. "Did you understand the agreement, as finally agreed upon at the time the deed was made, to be that set out in these two writings?"

A. "Yes."

Q. "How much did you talk about your trade before the deed was made?"

A. "We talked about it a good deal, off and on, from the time Heath came till the deed was made."

Q. "Did these writings fully and fairly express precisely what you intended they should?"

A. "Yes."

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Q. "How did it come these writings were executed?"

A. "I wanted to show what my rights were."

Q. "Did you ask to have your bargain put in writing?"

A. "Yes."

Q. "Was the object in putting it in writing to have it in black and white, so there should be no mistake about it?"

A. "Yea."

Q. "Were you satisfied when these writings were drawn and signed that they contained your agreement, as made?"

A. "Yes."

Q. "At the time the deed was made, did not Heath pay your mother two hundred dollars in money for you, and give his note for two hundred dollars more, to pay what you owed her?"

A. "Yes."

In answer to further questions, Williams stated that "the money paid on judgments for me by Heath was paid to Templeton, the sheriff, and that was included in my receipt for one thousand and seven dollars. At the time of making the deed Heath paid some expenses, three or four dollars, and gave me fifteen or twenty dollars. I don't know whether he then paid Littler twenty dollars for me. In February, 1859, there was nothing paid by Heath but the one thousand and seven dollars. Sumner was to let me have four thousand dollars at twenty-five per cent interest, and I was to take enough of this to pay Heath, and put the balance in cattle, to be kept on shares with Sumner. The land, when the deed was made, was not rated at anything. We counted up what I owed. It was arranged that Heath was to let me have enough money, with my note, to make one thousand dollars; that was all he was expected to pay. The reason a mortgage was not made was, that if he paid other debts he would be secure. The eighty acres where the house was were not under mortgage. It was this one thousand and seven dollars I proposed settling in January, 1859. I expected to pay what was due him. I could have got the money, as I said, from Sumner. I told Heath not to pay

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Harman anything till the spring of 1859. He then paid on it five hundred dollars to Rudolph Gates. I was present, and am certain of this. The land in the bond of Sumner is covered by my deed, and is part of the three hundred and sixty acres. We counted up what I owed; five thousand four hundred dollars was the amount of my debts. We talked a good deal. Heath said the land was not worth more than fifteen dollars per acre. I said it was worth more. The south-west eighty acres of mine was worth forty dollars per acre, and twenty-five dollars per acre without the timber. There was on my land a frame house, thirty-two by sixteen feet, and a good barn. Some of the land had been in cultivation twelve years; some of one forty, thirty-five years, an orchard; the underbrush had been cut out of much of the timber. I assigned to Heath the bond of Sumner."

A list of payments by Heath was shown to Williams, which he admitted, as to amounts, as paid or assumed by Heath under the agreement. On re-examination, he stated that he supposed he must have been in error in saying one thousand and seven dollars was all that was paid till after the year had expired.

Philip Griffin testified, that in December, 1857, he offered for this farm thirty-two dollars per acre, cash, and it was worth it.

Joseph Heath was introduced on his own behalf, and for his father, and denied any agreement to credit the amount due for labor by Williams or the profit on the cattle upon the debt secured by the land. He also denied that Williams offered to redeem in January, 1859, or within the year. *He was not examined as to whether the transaction was intended as a mortgage or sale.* He owned other adjoining lands, and stated, "from these tracts and the Barton Williams tract I have made rails and fences backwards and forwards as I thought best, but never sold a rail, or took one away from these several tracts.

Witnesses testified as to the value of the land at the time

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of the conveyance. Williams' witnesses fixed the value as follows:

Barton Williams, per acre,	-	-	\$25.00
Robert Atkinson, " "	-	-	18.00 to 24.00
H. Parker, " "	-	-	25.00
T. Stembel, " "	-	-	15.00 to 25.00
P. Griffin, " "	-	-	32.00
T. Smiley, " "	-	-	22.00 to 25.00
N. Melville, " "	-	-	22.00 to 25.00

Heath's witnesses testified as follows:

David Heath, per acre,	-	-	\$12.00 to 15.00
S. Ellsworth, " "	-	-	10.00 to 15.00
T. Bell, " "	-	-	18.00 to 20.00
W. Bell, " "	-	-	15.00
G. Shuster, " "	-	-	15.00
Joseph Heath, " "	-	-	15.00

Evidence was also introduced to show the rental value of the property.

The appellant asked the court to instruct the jury as follows:—

“1. To construe a written contract is the duty of the court, and the court is alone responsible for the correctness of such construction.

“2. If the jury find from the evidence that an absolute deed was made of the lands in controversy, by Williams to David Heath, and the contemporaneous oral agreement was fully, fairly, and accurately embraced in the two written instruments dated 25th March, 1858, one signed by Williams, the other by Joseph Heath, these said instruments should alone be regarded as containing the agreement of the parties, and the agreement should be enforced, unless contrary to law.

“3. The said deed and two writings, taken together and without any other proofs, would show the transaction to be a conditional sale, and not a mortgage.

“4. Under these instruments, without further proofs,

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there would be no debt of any kind created by these instruments in favor of Heath against Williams.

“5. And it is a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If the remedy really exists, its not being reserved in terms will not affect the case. But it must exist, in order to justify a construction which overrules the express words of the instrument.

“6. Under these written instruments, if the lands had been found to be only half as great in value as the sum agreed to be paid by Heath, he could only have got the lands, and could not have asserted any claim against Williams.

“7. If Williams, at the end of the time fixed by the instruments, had complied with his agreement and made the payments stipulated for, then Heath would have been entitled only to the payments made by him, without interest, and would not have been liable to any rents.

“8. Gross inadequacy of price does not exist when the price is within the limits of any range of prices fixed by competent, credible, and trusty witnesses; there often being wide differences of opinion among men as to values. But to constitute gross inadequacy, it must be so great as to shock the senses of fair men, and show that some fraud or oppression has been practiced. There would be gross inadequacy if the price should bear but a small proportion to the real value.

“9. To warrant a court in holding a transaction that is on its face a conditional sale, a mortgage, on account of inadequacy of price, that inadequacy must be so great as to be gross inadequacy as already defined.

“10. When the question is, whether a transaction is a conditional sale or a mortgage, if it is shown that the grantee was put into possession at the time of the execution of the deed, and with the knowledge, and without objection from the grantor, has exercised the ordinary rights of an owner, making lasting and valuable improvements, making

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expensive changes in the property, such facts are strong evidence that the transaction was a conditional sale, and not a mortgage.

"11. If, under the facts found, Williams had the right to demand and recover, after the expiration of the year, from Heath, any unpaid balance of the fifty-four hundred named as the price of the land, then this was a conditional sale, and not a mortgage."

These instructions were refused, and the court gave the following:—

"1. The instruments of writing given in evidence, of themselves and in the absence of other testimony, do not constitute the deed in the pleadings mentioned, a mortgage. If, however, the jury shall believe from the evidence that the defendant, Williams, made the deed to the plaintiff mentioned in the pleadings, to secure a debt which the defendant owed Joseph Heath and other sums of money which the plaintiff should pay for him of debts pressing upon him, with an oral agreement that the lands should be conveyed to him upon the defendant's payment of the sum thus owing to Heath and other sums paid by him, and the lands conveyed to Heath were of materially greater value than Williams was to receive for them, and the parties afterward met and executed the written agreements of March 25th, 1858; the transactions taken together operate as a mortgage.

"2. If you determine the conveyance of the land to be a mortgage security, then you are to proceed to take an account of what, if anything, is due the plaintiff. The plaintiff is entitled to have allowed him the moneys paid to Williams, or to other persons upon his request, the judgments and mortgages upon the lands, with interest, the taxes and the value of necessary improvements and repairs, and such other items as he has shown to be due him from Williams. Williams is entitled to credit for all such sums as he has paid in labor, rents of lands, damages for waste, profits on

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cattle, or other items paid to the plaintiff or received by the plaintiff on his (Williams') account.

"3. When a debt, absolute on its face, has been executed, if a debt existed between the parties and is embraced as the whole or part of the consideration, then, if the debt still subsists and the relation of debtor and creditor remains, it is a mortgage. But if the debt is extinguished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding it if he pleases by a given time, and thereby entitle himself to a conveyance, it is a conditional sale.

"4. If the jury, under the instructions of the court, find this a conditional sale, then Williams must show that he has complied with the condition within the time limited, or he will have no rights under the agreement.

"5. If the jury find, from the evidence, this to be a conditional sale, and that the condition has not been complied with, and the time for compliance has expired, they will find for the plaintiff and say, 'we, the jury, find for the plaintiff, and that his title to the lands in controversy is absolute, and should be quieted against any claims of the defendant, Barton Williams.'"

There are many authorities cited by counsel, in which the question of the construction to be placed upon contracts of this nature is fully discussed. But as the rule that parol evidence is admissible to aid in such construction must be regarded as settled in this State, we shall not consider that question as requiring any special argument, for the contract must be governed by the law as it exists here; "for whether a given transaction is a mortgage or not, and whether it is or is not valid, is a matter of *lex rei sitæ*." 2 Washb. Real Prop. 44, 7 (3d ed.).

In the case of *Davis v. Stonestreet*, 4 Ind. 101, it is said, "There are numerous criteria recognized by the courts to distinguish between a conditional sale and a mortgage; the price, the circumstances, the situation of the parties, &c. But these and other considerations, which have con-

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trolled the decisions of courts of equity, are so blended in the reported cases, setting aside, at times, the express agreements of the parties, that it is difficult to deduce a rule at once safe and comprehensive. The element which is regarded as conclusive in one case, is wholly wanting in another; and each case seems to be decided very much on its own peculiar circumstances."

This question was discussed in the Supreme Court of the United States in the case of *Russell v. Southard*, 12 How. 189. In that case Russell conveyed by an absolute deed in fee simple to Southard two hundred and sixteen acres of land. At the time the deed was delivered, Southard gave to Russell a memorandum. It recites, in substance, that Russell has this day sold and absolutely conveyed to Southard said Russell's farm, and the possession thereof actually delivered, for a sum of money stated; that said Southard agrees to resell and convey to Russell said farm, for the same sum of money before stated, to be paid within four months from date; that if the money be not paid punctually, the agreement should be null and void. The instrument then goes on thus: "This agreement of resale by the said Southard to the said Russell, is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and after the date hereof, of the said sum of \$429.81 $\frac{1}{2}$ and interest thereon from this date, as aforesaid. And this agreement is to be valid and obligatory only upon the said Southard, upon the punctual payment thereof of the sum and interest as aforesaid, by the said Russell." This agreement was signed by both parties in duplicate. The court, after alluding to the character of the deed, and quoting in full said agreement, proceed: "The first question is whether this transaction was a mortgage, or a sale. It is insisted, on behalf of the defendants, that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary, or add to their contents. But we have no doubt extraneous evidence

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is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear, both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practiced, under the shelter of any written papers, however precise and complete they may appear to be." Here follow numerous authorities. "It is suggested," say the court, "that a different rule is held by the highest court of equity in Kentucky. *** But we do not perceive that the rule held in Kentucky differs from that above laid down. That rule, as stated in *Thomas v. McCormack*, 9 Dana, 109, is that oral evidence is not admissible in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation, and some proof of fraud or mistake in the execution of the conveyance, or some vice in the consideration. But the inquiry still remains, what amounts to an allegation of fraud, or of some vice in the consideration—and it is the doctrine of this court, that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage."

Chancellor KENT has expressed the view taken by a court of equity, as distinguished from the arbitrary rules controlling a court of law, thus: "In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and difficulties behind us. Not only the original severity of the common law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influ-

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ence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law." 4 Kent Com. 158.

In the note to *Thornbrough v. Baker*, Mr. Hare, after a very full citation of the decisions on the subject, draws this conclusion: "The course of decision which allows the legal effects of a deed, whether absolute or conditional, to be varied by parol evidence of the circumstances under which it was given, or the end which it was designed to fulfill, is not inconsistent either with the Statute of Frauds or the more general rules of evidence of the common law. If it were so, the equity of redemption of the mortgagor, and the whole system of equity as to mortgages, could have no existence; for nothing can be a greater departure from the terms of an instrument, than to convert a deed conditioned to be void on the performance of an act by the grantor on a day certain, which like all conditions in avoidance is legally inoperative unless fulfilled to the letter, into a vested equitable estate, exposed to a legal forfeiture against which equity will relieve. Yet such is the long and well established course adopted in chancery, in every instance in which it has occasion to pass judgment upon the respective rights of a mortgagor and mortgagee. It is obvious, therefore, that the equity of the mortgagor is paramount to the deed, and that facts and circumstances establishing its existence, may be given in evidence, not for the purpose of contradicting the deed, but for that of controlling its operation." 3 White & T. Lead. Cas. 628 (3d Am. ed.).

Washburn defines a mortgage, as "any conveyance of lands intended by the parties, at the time of making it, to be a security for the payment of money or the doing of some prescribed act." 2 Washb. Real Prop. 43, 7 (3d ed.).

That this was so intended, we have the positive evidence of Williams, uncontradicted by Heath, and the evidence

that Heath himself offered to make the loan upon being secured.

And here we may as well remark that we attach no importance to the statement by Williams on his cross-examination, that he understood "the agreement, as finally agreed upon at the time the deed was made, to be that set out in the writings;" and that "these writings fully and fairly express precisely what he intended they should." His attention was called to these writings before he made his statement of the contract; and the shrewdness of counsel cannot conceal the fact that the witness on cross-examination was simply testifying to the legal construction placed by him upon the instruments. The effect of his evidence was simply that he intended to execute what, in legal effect, would amount to a mortgage; that he understood the writings as expressing such an intention and amounting to such an instrument, and so regarding them, they did express his understanding, and he was satisfied with them. The witness was made to swear to the legal effect of the writings, and of course such evidence is of no value and cannot qualify in any way his statement of the circumstances, conversations, and intentions of the parties to the contract; and force is added to this evidence, when the plaintiff is placed upon the stand, and no denial that the instrument was intended to secure the loan of money is attempted by him. To this may be also added the fact, that a witness owning some seven hundred acres of land near this farm, offered the defendant Williams, a month or two preceding this transaction, thirty-two dollars per acre in cash for the farm. This certainly shows no intention on the part of Williams to sell, and the fact that he had negotiated a loan to pay off Heath's debt, placed him beyond the present necessity of selling.

The instruments upon their face are not complete, either as a mortgage or conditional sale. As a conditional sale, there is no time fixed for payment of the purchase money, and it left it at the pleasure of the plaintiff to pay claims against the land, or to leave Williams to answer them. On

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the other hand, there is no agreement in the writings binding Williams to repay the money, which, if it were there, would be conclusive evidence of a mortgage. The proof of a loan, however, supplies this defect, and would give Heath a lien upon the land to secure the debt. Equity, in a case of doubt, will construe a writing as a mortgage rather than a conditional sale. *Davis v. Stonestreet*, 4 Ind. 101, and authorities there cited. In that case it is stated, that courts of equity are disposed to consider every deed, whatever be its form, which resolves itself into a security for the performance of any act, as a mortgage.

In *Harbison v. Lemon*, 3 Blackf. 51, A. conveyed a tract of land to B. in consideration of a certain sum of money, and B., on the same day, obligated himself by a bond to reconvey the land to the grantor on the repayment of the purchase money within a certain time. Held, that these two instruments of writing, taken together, amounted to a mortgage. See, also, *Holcroft v. Hunter*, 3 Blackf. 147; *Watkins v. Gregory*, 6 Blackf. 113; *Crassen v. Swoveland*, 22 Ind. 427.

These cases, indeed, go far to deny the construction given the instruments upon their face by the court in this case, and rather tend to declare the transaction a mortgage, *prima facie*, without parol proof. But this point we do not decide.

The writings, with the evidence of the circumstances under which they were given, relieve the case of all doubt, and fully sustain the findings of the jury. So far as the appellant's rights were involved, the instructions of the court were unobjectionable.

The judgment is affirmed, with costs.

GREGORY, J., having been of counsel, was absent.

S. A. Huff and R. Jones, for appellant.

H. W. Chase, J. A. Wilstach, J. L. Miller, and D. P. Vinton, for appellee.

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130	514
138	671
139	514
140	513
141	288
130	514
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STATUTE.—*Judicial Cognizance of.*—The courts of this State must take judicial notice of what is and what is not the public statutory law of the State.

SAME.—*Limit of Judicial Inquiry.—Official Authentication.*—Where a statute is authenticated by the signatures of the presiding officers of the two houses of the legislature, the courts will not search further, to ascertain whether such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law.

APPEAL from the Marion Common Pleas.

The appellee was the plaintiff below, and filed his complaint under oath, alleging, that by an act of the General Assembly of the State of Indiana, passed at the special session thereof in the year 1869, entitled, "An act making specific appropriations for the year one thousand eight hundred and sixty-nine and eighteen hundred and seventy," which act was in full force and effect on the 24th day of May, 1869, and from that time hitherto; it was, among other things, enacted as follows: "Sec. 17. That Thomas M. Browne be allowed the sum of fifteen hundred dollars, for services as attorney to the Morgan Raid Commission, by appointment from Governor Baker, as provided for in the concurrent resolutions of the General Assembly of the State of Indiana, for the year 1867;" that on the 24th day of May, 1869, the plaintiff, said Thomas M. Browne, demanded of the defendant, John D. Evans, Auditor of State, at the office of the Auditor of State, in the city of Indianapolis, that he draw a warrant as such Auditor of State, in favor of the plaintiff on the Treasurer of State of the State of Indiana, for the said sum of fifteen hundred dollars, due and payable to him out of the Treasury of the State of Indiana, by said act; that said Evans, as such Auditor of State, utterly refused to issue or draw said warrant, and still refuses. Prayer for a writ of mandate directed to, commanding, and requiring said Evans, as such Auditor of State, to issue and draw said warrant for fifteen hundred

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dollars upon the Treasurer of State in favor of the plaintiff, without delay.

The defendant answered in one paragraph, admitting the said allowance to the plaintiff, by said act, as stated in the complaint, but charging that said act did not become a law of the land, binding and justifying the defendant in acting under the same by drawing his official warrant on the Treasury for the several sums of money therein appropriated, for the reason that said bill, after its passage in the House of Representatives, was reported, in conformity to usage, to the Senate for its action, and was by the Senate amended in many important particulars, by the addition of many new sections, making additional appropriations; that the bill thus amended was returned to the House, and before the amendments so made by the Senate were considered and acted on by the House, forty-two members of said House of Representatives resigned their offices as members of said House, by presenting and delivering to the Governor of the State their resignations in writing, which were filed with the Governor on the 13th day of May, 1869, thereby then and there destroying the capacity and power of said House of Representatives to legislate and transact business coming before it as one of the branches of the General Assembly of Indiana, reducing the number of its members below sixty-seven, its constitutional quorum, to wit, to fifty-eight; that afterwards, on the 14th day of May, 1869, said House, without said constitutional quorum, concurred in the several amendments of the Senate, and finally passed said bill; that on the same day, the 14th of May, 1869, but not until after said concurrence and passage had taken place, the Governor officially communicated to the House information of the fact that forty-two members of said House had, on the 13th day of May, 1869, so resigned; and hence, that said bill did not, under the forms of the Constitution and in accordance with its requirements, become a law.

To this answer the plaintiff demurred; the demurser was:

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overruled, and the plaintiff excepted. Reply in two paragraphs:—

First, the general denial.

Second, that on the 13th day of May, 1859, the day before the amendments of the Senate were concurred in, there was had a call of the House, and ninety members were present and answered to their names; that there was a quorum of the members of said House present at the time of the concurrence by the House in the amendments of the Senate to said bill, as appears by the journal of the proceedings of the House. A copy of the journal of the House for the 13th of May, and for the 14th of May up to the time when the Senate amendments were concurred in, is made a part of the reply.

The copy of the journal of the House for the 13th of May, 1869, shows that the House met; that upon a call of the House fifty-one members answered to their names; that the House ordered that the absentees be sent for; that the House adjourned, by a vote of thirty-six to fifteen; that at two o'clock in the afternoon the House met; that a call of the House was had, and ninety members answered to their names; that a motion to lay upon the table a motion to dispense with the further proceedings under the call was disagreed to—ayes, fifteen; noes, fifty-five; that sundry resolutions were passed; that upon a vote on the motion to lay on the table the motion to dispense with the further proceedings under the call, there were fifty-two ayes and three noes; and that the House adjourned.

The copy of the journal of the House for the 14th day of May, filed with the reply, shows that the House met; that on motion, the reading of the journal of May 13th was dispensed with; that a motion for a call of the House was disagreed to; that the House adjourned; that the House met at two o'clock in the afternoon; that on motion, the House took up the message of the Senate containing amendments to the Specific Appropriation Bill; that the message with the amendments was entered upon the journal; that

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the question being on concurring in the amendments, it was agreed to; that a motion to reconsider the vote concurring in the amendments was laid on the table.

The defendant demurred to the reply, alleging for cause, "that the facts therein stated do not constitute a reply to the facts set up in defendant's answer, and that they are not sufficient in law to justify the order of mandate herein against the defendant."

The demurrer was overruled, and the defendant excepted.

By agreement, the cause was tried by the court. There was a finding for the plaintiff, and it was ordered that the writ of mandate issue against the defendant.

The defendant moved for a new trial, and filed his reasons therefor, as follows:—

"1. The finding, judgment, and order of said court are not sustained by sufficient evidence.

"2. The finding, judgment, and order of said court are contrary to law."

The motion was overruled, and the defendant excepted, and filed his bill of exceptions.

On the trial, the plaintiff proved his demand on the 24th of May, 1869, at the office of the defendant, in Indianapolis, and the refusal of the defendant to issue the warrant.

The defendant admitted that the copy of the journal of the House filed with the reply was a true copy of the original journal of the House of the 13th and 14th of May, up to the time of the concurrence of the House in the Senate amendments; and the copy was introduced in evidence by the plaintiff.

The defendant admitted the allowance of fifteen hundred dollars to the plaintiff by said specific appropriation bill.

In addition to the evidence contained in the bill of exceptions, a certified copy of a message of the Governor is by agreement made part of the evidence and attached to the record. By this message, the Governor communicated to the House, that forty-two members thereof (naming them) presented and delivered to him their resignations as such

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members, on the 13th of May, 1869; and it is agreed that this message was transmitted by the Governor, through the Speaker, to the House, on the 14th of May, 1869, after the House had concurred in the amendments of the Senate to the specific appropriation bill.

Prefixed to the enrolled act filed in the office of the Secretary of State, is the following statement:—

“House bill No. 311, hereto attached, entitled, ‘An act making specific appropriations for the year one thousand eight hundred and sixty-nine, and eighteen hundred and seventy,’ having been presented to me on the 15th day of May, 1869, and the final adjournment of the General Assembly having taken place on the 17th day of May, 1869, and said act not having been approved and signed by me, and not having been filed in the office of the Secretary of State with my objections thereto within five days after said adjournment, said act therefore took effect, under the constitution, without executive approval, on the 22d day of May, 1869; and in now filing it in the office of the Secretary of State, I deem it my duty to accompany it with a statement of facts as to the manner of its passage. The bill having regularly passed the House, was reported to the Senate, and was amended in many material particulars by the Senate, by the addition of many new sections making additional appropriations. Thus amended, the bill was returned to the House, and before the amendments so made by the Senate were considered by the House, forty-two members of the House resigned their offices as members of the House of Representatives, by presenting and delivering to the Governor their resignations in writing. These resignations were made on the 18th day of May, 1869, and afterwards, on the 14th day of May, 1869, the House of Representatives concurred in the said amendments of the Senate to said bill; and on the same day, but not until after this concurrence had taken place, the Governor officially communicated to the House of Representatives information of

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the fact that the said forty-two Representatives had, on the said 13th day of May, 1869, so resigned.

(Signed) "CONRAD BAKER, Governor.
"EXECUTIVE CHAMBER, Indianapolis, May 22d, 1869."

After the signatures of the presiding officers of the legislature upon the enrolled act is the following endorsement:

"This bill was presented to me on the 15th day of May, 1869, and the final adjournment of the General Assembly took place on the 17th day of the same month; and the bill not having been acted upon within five days thereafter, took effect, without executive approval, on the 22d day of May, 1869.

(Signed) CONRAD BAKER."

FRAZER, J.—The following questions only, are necessary to be considered in order to reach a decision of this cause, viz: 1. Must the courts of this State take judicial knowledge of what is and what is not the public statutory law of the State? 2. When a statute is authenticated by the signatures of the presiding officers of the two houses, will the courts search further, to ascertain whether such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law?

1. There are some cases in our reports in which it has been conceded that an issue may be made upon the record by pleading, upon the determination of which, upon evidence adduced, the courts are to be governed in deciding what is a statute of the State; but a very full consideration of the question on the present occasion, aided by able counsel, has resulted in the clearest conviction that the doctrine has no support whatever in sound principle. Can it be tolerated that a court must be informed what the law is by the verdict of a jury, as would be in criminal cases? that in one case it shall be compelled, by the finding of an issue, to determine that the legislature has enacted thus and so, and in the very next case to be tried, where the same issue is not made by the pleadings, or the same evidence has not

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been produced, or another jury has found differently, the very same court must determine that there is no such statute? It is a maxim old as the common law, and a rule of necessity, that the court takes judicial notice of public law; it is presumed to know what it is, and it is its duty to know it. Even the private citizen must know it at his peril; and his responsibilities and duties are based upon the conclusive presumption that he has this knowledge. Must the court employ the machinery of a trial to give information to the judge, which, as a citizen, he must, at the risk, possibly, of his liberty or life, have possessed before he was called to the bench? It is a most mischievous departure from plain and wise maxims derived from that system of laws which forms the basis of, and constitutes largely the body of, ours; and, while it would have disturbed the harmony and order of judicial administration in England, it would in this State, in view of the provisions of our constitution, which contains specific directions for the mode of authenticating statutes by high legislative officers, acting under solemn oath, and requires a journal of legislative proceedings to be kept and published, be entirely destitute of any conceivable utility. The enrolled acts, with their authentication, are deposited in a public office, and are there accessible to everybody. The journals are public documents, at least, if not records; and are also within reach of all. Whatever, affecting the question of a quorum, such as the resignation of members, may have been lodged with the Governor, may also be inspected. In short, every fact upon which, in any view, depends the question whether a document purporting to be a statute has, by legislative action, been invested with the force of law, is, in its nature, a public fact which may be easily ascertained; it is a fact of public current history, and there is therefore no necessity for bringing it to judicial knowledge by the finding of an issue. It may be true that, ordinarily, the courts would not, unless the matter was questioned, make any investigations beyond the statute-book itself; but this argument is not forcible; for the

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industry and research of counsel can as well put the court upon inquiry by an argument and a reference to the sources of information, as by pleading upon the record. To us it seems an astonishing fact in the history of jurisprudence, that there should, in this country especially, have ever existed a conflict of decisions upon the subject, or that it should have been seriously presented as a question for judicial determination.

In *Skinner v. Deming*, 2 Ind. 558, this question was virtually decided the other way, on the authority of *Purdy v. The People*, 4 Hill (N. Y.), 884. In *Coleman v. Dobbins*, 8 Ind. 156, there is a dictum to the same effect, though it is expressly declared that the point is not decided definitely. The judgment, however, implies such a decision, and cannot be supported otherwise than by this implication. These cases, and some others in our reports which concede the same point, have embarrassed us; but we cannot concur in them.

It is believed that this anomalous and essentially mischievous doctrine had its origin in New York. After the subject had there become enveloped in uncertainty by a multitude of curious opinions delivered in *Purdy v. The People*, *supra*—a case from the report of which it is almost impossible to tell what was held by the majority to be law upon any subject, but in which the actual judgment of reversal in favor of the plaintiff in error (who disputed the validity of the passage of an act, and yet did not raise the question by pleading) precludes the possibility of such a ruling—the Court of Appeals finally, in *The People v. The Supervisors, &c.*, 4 Seld. 317, without giving any reason or citing any authority to sustain it, did distinctly lay down the doctrine, in a case where it was entirely unnecessary to have considered the question at all. The opinion in *Coleman v. Dobbins* cites *Speer v. Plank Road Co.* 22 Penn. St. (10 Harris) 876. That case is not to the effect supposed. *Miller v. The State*, 3 Ohio St. 475, decides nothing whatever upon the subject. It is probable, however, that this

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New York doctrine (now exploded in that State) has passed into other States, and been adopted without much examination. Indeed, whenever it is admitted that there is no certain and conclusive method by which the legislature is to make known its action, and the question, what is the statute law? is held to require search in all quarters for facts to answer it, it becomes quite plausible to say that these facts should be ascertained by an issue. When we come to consider the second question which we have proposed to ourselves, it will be seen that our view of it does not, however, involve us in that entanglement.

2. Immemorial usage, having the force of law, and therefore incumbent as a duty upon the presiding officer of a legislative body, requires that he should not proceed with business in the absence of a quorum. In case of doubt, he may count the members present, and thus ascertain the fact. A call of the house may be had in order to determine it. The very fact that the body proceeds with legislative business must therefore be, to all the world, very strong evidence of the presence of a quorum; for, if a quorum were not present, then a duty imposed by parliamentary law upon the presiding officer has not been performed; and it is not becoming that one co-ordinate department of the government should thus condemn another. But this is not all. Of necessity, the body must, in the first instance, judge for itself as to the presence of a quorum. No other tribunal can so well ascertain the fact as itself; and it would seem scarcely fit, therefore, that the courts should be at liberty to enter into that investigation. It may be possible that the question of the presence of a quorum is a legislative and not a judicial question, and that the courts, in a case like this, cannot inquire into it without passing beyond their jurisdiction as limited by the constitution, and thereby invading the field which belongs exclusively to the legislature. The form of our State government was intended to make these two departments co-equal but separate and independent of each other, each having distinct functions to perform,

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and wholly beyond the control of the other. But these remarks are not intended as a decision of the point suggested, nor as an intimation of what would be its determination in a case where a solution of it might be necessary. The doubt is expressed as to our power to enter upon the question, because it should, unless the matter is otherwise clear, have some little weight in the consideration of the inquiry whether we can look behind the official authentication made by the proper officers of the two houses. Courts should be very careful not to invade the authority of the legislature. Nor should anxiety to maintain the constitution, laudable as that must ever be esteemed, lessen their caution in that particular; for if they overstep the authority which belongs to them, and assume that which pertains to the legislature, they violate the very constitution which they thereby seek to preserve and maintain. No person charged with official duties under the judicial department shall exercise any of the functions of the legislative department. Art. 3, sec. 1.

The question in hand may now be approached more closely, and, indeed, its importance only, and not at all any difficulties attending it, will justify the foregoing preliminary observations.

The constitution provides that a majority of all the members elected to each house shall be necessary to pass every bill, and that all bills "so passed shall be signed by the presiding officers of the respective houses." Art. 4. sec. 25. The vote on the passage of a bill cannot, of course, be lawfully taken in the absence of a quorum. What, then, was the purpose in requiring this attestation by the presiding officers? Was it intended as an idle form? It is not fair so to assume. What possible object, then, was sought to be accomplished by it, unless it was to furnish evidence that the paper thus attested had been by the proper processes of each house clothed with the force of law—evidence upon the enrolled act itself which should be taken as authentication and prove itself upon inspection? The act, the validity of which is here controverted, is thus attested by

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sworn public officers, in the form required by the constitution. It is important, certainly, that the question, whether the enactment of a statute is valid, shall be made capable of ready and correct solution, and that the evidence thereof shall be preserved, and that it shall not depend upon doubtful or conflicting evidence. When all are bound to know the law, they should have the means of knowledge, and not merely reasons for conjecture, uncertainty, and doubt. It has been conceded in the argument for the appellant that the attestation in this case is probably *prima facie* sufficient to show a statute regularly and properly enacted, but contended that this only is the force of the authentication required by the constitution. The houses must keep journals of their proceedings, which, however, are not, like the enrollment, required to be either attested or preserved (1 G. & H. 563); and it is argued that there is an appeal to these, from the official attestation of the presiding officers, and to the archives in the executive department. ✓ Would the journals be as satisfactory to the mind? Such journals, it is notorious, are, and must be, made in haste, in the confusion of business, and are often inaccurate. Their reading is frequently omitted from day to day, so that those errors go without correction. They do not show the nature of the bill as introduced, but merely the amendments which have been proposed to it. They are not required to contain anything by which it could be even identified and its passage traced. They are not required to show whether or not a quorum is present. Journals such as these had been kept by the legislature of this State from the beginning. The convention which framed the present constitution must be supposed to have had knowledge of these things. Can the opinion be entertained that they meant that the journals, necessarily imperfect and incomplete memorials, should, as evidence, override the solemn attestation of the passage of a bill, which they were so careful to require, by the presiding officers? Or can it be supposed that they meant that two records should be looked to as

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concurrent proofs of the same fact, and yet made no provision for guidance when these should happen to be in conflict? By what reason or analogy can we sustain ourselves in holding that the journal should override the signatures upon the enrolled act? Surely not because it is, in the nature of things, more likely to speak the whole truth upon the question in hand. Surely not because it is a rule that the truth of any other record in the world, attested as the law requires to make it proof, may be successfully combated by something else, not made by law superior to the attestation of the proper officer.

This exact question has received the consideration of other American courts, who have thoughtfully and with careful steps reached the conclusion, that the authentication of the presiding officers of the legislature is conclusive evidence of the proper enactment of a law, and that they cannot look elsewhere to falsify it. *State ex. rel. &c. v. Young*, 5 Am. Law Reg. (N. S.), 679; *Pacific R. R. Co. v. The Governor*, 23 Mo. 358; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *Fouke v. Fleming*, 13 Md. 392; *People v. Supervisors of Chenango*, 4 Seld. 317; *People v. Devlin*, 33 N. Y. 269.

Some other New York cases have been cited in the argument, as in conflict with the view which we have already expressed. We do not so deem them, but if they were so intended, the recent one of *The People v. Devlin, supra*, shows that that doctrine is no longer maintained in that State.

It is believed that the English cases are, without exception, to the same effect—that the roll, called here the enrolled act, imports absolute verity, and therefore cannot be questioned. It is argued, however, that the English cases are not applicable here, for the reason that parliament did not keep, nor was it required to keep a journal of legislative proceedings. This argument is plausible, but it is, nevertheless, unsound. It assumes that the journal is in its nature equal or superior, as an instrument of evidence, to the

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authenticated enrollment. But we have seen that in its nature it is not so, and that it is not admissible to infer therefrom that it was intended as sufficient to overthrow the latter. If we are correct in this, then the English cases upon the subject are entitled to great consideration.

But it is argued, that if the authenticated roll is conclusive upon the courts, then less than a quorum of each house may, by the aid of corrupt presiding officers, impose laws upon the State in defiance of the inhibition of the constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must, of necessity, be confided to officers, who, being human, may violate the trusts reposed in them. This perhaps cannot be avoided absolutely. But it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. It cannot, we think, look beyond that authentication, because of the constitution itself. If it may, then for the same reason it may go beyond the journal, when that is impeached; and so the validity of legislation may be made to depend upon the memory of witnesses, and no man can, in fact, know the law, which he is bound to obey. Such consequences would be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been enacted by competent houses. Human governments must repose confidence in officers. It may be abused, and there may be no remedy.

Nor is there any great force in the argument which seems

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to be regarded as of weight by some American courts, that some important provisions of the constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the constitution, or else it assumes that they will willfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligations.

It is finally suggested, in argument, that the endorsement upon the roll by the Governor and the statement by him attached thereto constitute a veto of the bill. This idea is wholly inadmissible, and, indeed, is expressly contradicted by those instruments. Certain facts are stated, but they are not made the basis of objection to the bill becoming a law. Both instruments must be looked to, to ascertain the intention of the executive.

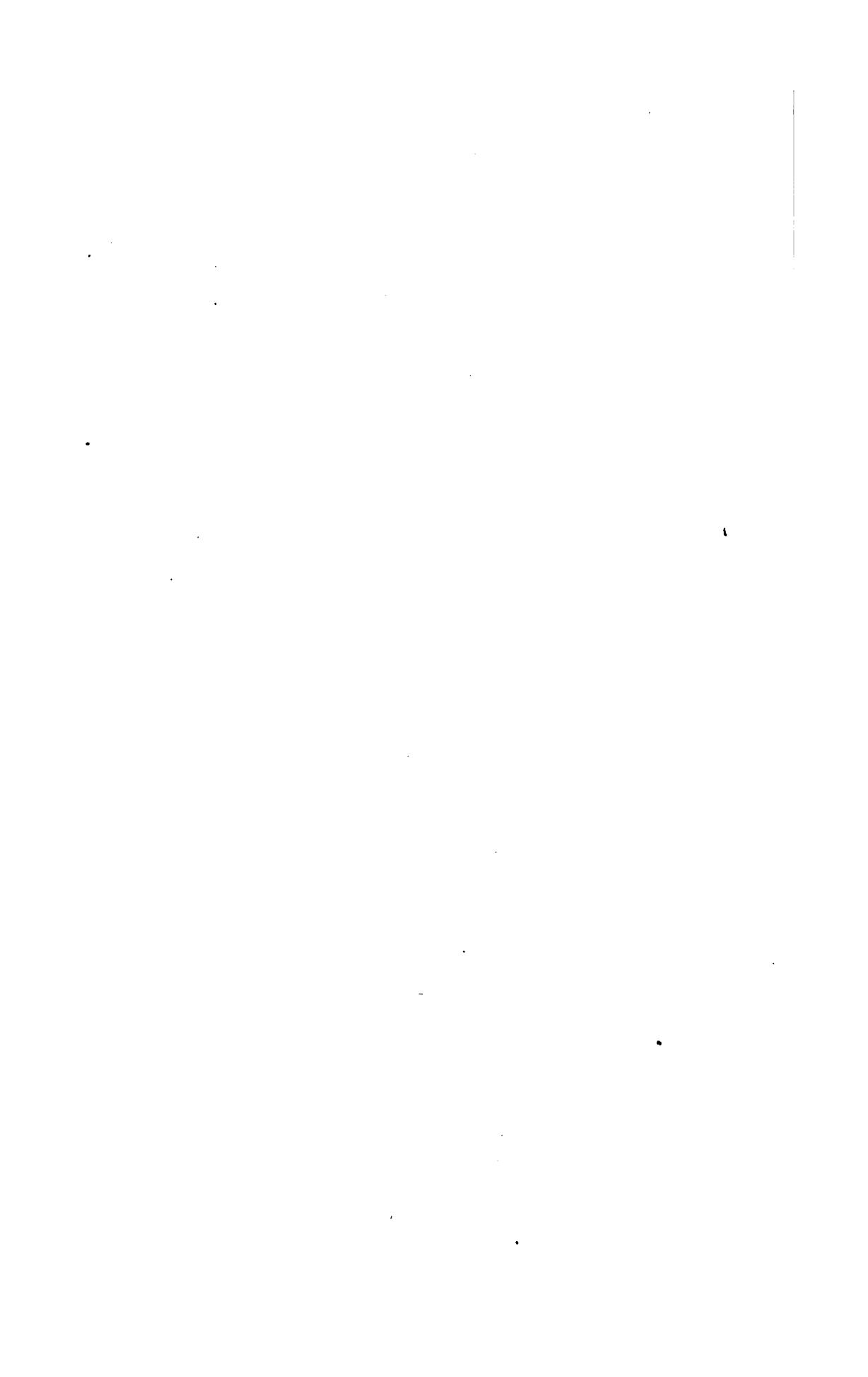
Having reached the conclusion that the courts must, for themselves, ascertain what is the public law of the State, it follows that there was much unnecessary pleading in the case, and that the questions made by the demurrs were wholly immaterial, except simply the question, was the complaint sufficient? and, having determined that the courts cannot look beyond the enrolled act and its authentication, it results that the complaint was good in law, and that there is no available error in the record.

The case being thus disposed of without reaching the question—much and ably discussed in the argument—what constitutes a quorum under our State constitution? there is no necessity, nor indeed propriety, in any consideration of that subject by this court upon the present occasion.

The judgment is affirmed, with costs.

J. W. Gordon, W. Morrow, and N. Trusler, for appellant.

T. M. Browne, S. E. Perkins, J. S. Harvey, N. Van Horn, J. E. McDonald, A. L. Roache, and E. M. McDonald, for appellee.



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1. *Delivery of Goods.—Termination of Liability.*—As a general rule common carriers by land are bound to deliver the goods to the consignee at his residence, or his place of business, where, from the nature of the parcels, this is the more appropriate place for their delivery; nor is it sufficient that they are left at the public office of the carrier, unless by express permission, or a usage so established and well known as to be equivalent to such permission. But if the consignee is absent, and the carrier, after diligent inquiry, cannot find him, or ascertain the place of his residence or business, then the liability as a carrier is deemed at an end; but it is the duty of the carrier to take care of the goods, by holding them himself, or depositing them with some suitable person for the consignee, and, in such case, the person holding the goods becomes the bailee of the owner or consignee, and is only bound to reasonable diligence. *The American Express Co. v. Hockett*.250
2. *Express Companies.—Negligence.*—Suit against an express company for the value of a package of money received by it to be carried and de-

livered to the plaintiff, which it failed to do. Answer, that the package was duly received at the office of defendant at the town to which it was directed; that the defendant, upon inquiry, could not find the residence of the plaintiff to be in said town or its vicinity, and, being ignorant of his real place of residence or post-office address, the defendant, on the day of the arrival of said package, wrote a notice informing the plaintiff of its arrival at said office and that it was ready for delivery, and inclosed said notice in an envelope addressed to the plaintiff at said town and duly stamped, and dropped the same into the post-office at said town, and placed said package in a safe owned by the defendant, wherein the defendant kept all money packages arriving by express for parties, and safely locked the same, the package remaining thus securely locked up for several days, and no one calling for it till it had been stolen by burglars, who in the night time violently broke into the office of defendant, where said safe was, and, without the knowledge of defendant, broke open said safe and feloniously stole, took, and carried away said package of money, without any fault or neglect of the defendant.

Held, that the facts alleged in the answer were not sufficient to discharge the express company from liability as a common carrier, and that if they could be so deemed, still, the answer failed to show that the defendant exercised reasonable care with the package as bailee after the termination of such liability..... *Ibid.*

COMMON LABOR.

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COMMON LAW.

See GUARDIAN AND WARD, 1.

Conveyance to Husband and Wife. See *HUSBAND AND WIFE, 3.*

Waste.—The common law doctrine that the cutting of standing trees is waste, does not apply to the members of a band of Indians in the use of a large tract of wild land in this

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Title to real estate. See JURISDICTION, 4, 5, 7.

1. *Jurisdiction.—Railroads.—Injury to Animals.*—A cow and heifer, together worth \$110, standing at the same time a few feet apart upon a railroad track, were killed by a passing train. The value of the heifer did not exceed \$50.

Held, that they constituted one cause of action, of which the Common Pleas Court had jurisdiction. *The Lafayette & Indianapolis R. R. Co. et al. v. Ehman*.....83

2. *Same.—Vendor's Lien.*—The Court of Common Pleas has jurisdiction to enforce a vendor's lien on real estate for unpaid purchase money. *Jemison v. Walsh*.....167

3. *Same.—Title to Real Estate.*—To deprive the Court of Common Pleas of jurisdiction in an action, on the ground that the question of the title to real estate is involved, that question must be the principal thing to be determined.....*Ibid.*

4. *Same.*—A cause was transferred from the Court of Common Pleas to the Circuit Court for the reason that the title to real estate was in issue, as appeared upon the face of the complaint.

Held, that the decision of the Common Pleas ordering the transfer was conclusive on the question of jurisdiction.

Held, also, that the ruling of the Common Pleas on demurrers to the complaint was *coram non judice* and void, and the action, when transferred, stood in the Circuit Court as an original cause brought therein. *Livesey et al. v. Livesey*.....398

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2. *School Revenue for Tuition.*—The only portion of the school fund which the school trustees may not expend in anticipation is the school revenue for tuition belonging to the State and by it apportioned...*Ibid.*

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Of judgment. See JUDGMENT, 6.
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2. *Jurisdiction.—Collateral Proceeding.*—The district courts of the United States had jurisdiction of a proceeding under the act of 1862, for the condemnation and sale of property seized under said act, and errors in such proceeding cannot avail against a judgment therein, in a collateral proceeding in a state court*Ibid.*

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Want of. See PROMISSORY NOTE, 1.
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1. A promise may be a sufficient consideration for a promise. *Davis v. Calloway*.....112

2. *Vendor and Purchaser*.—A purchased certain real estate from B., the legal title being in C., to whom there was a balance of purchase money due from B., for which A. gave his note to C. and took from him the deed.
Held, that, as between A. and C., the consideration of the note was the indebtedness of B. to C. *Starkey v. Neese* 222
- CONSTITUTIONAL LAW.
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 2. *Assessment.—Taxation*.—The constitution of our State recognizes a distinction between taxation for general purposes, and assessments for improvements resulting in special benefit to property. *Law et al. v. The Madison &c. Turnpike Co.* 77
 3. *Limit of Power of Assessment*.—The only limit upon the legislative exercise of this power of assessment in any given case is, that the subject matter for which the assessment is made shall result in local benefit to property within some special district, as distinguished from a more general good accruing to the people as citizens, and that the assessment shall be uniform and equal upon all property receiving special benefit.*Ibid.*
 4. *Streets.—Highways*.—Streets and highways are both equally proper subjects for the application of the principle of assessment.*Ibid.*
 5. *Gravel Road Law*.—The provisions of the act of March 11th, 1867, (Acts 1867, p. 167), authorizing the assessment, to the extent of the benefits received, of all lands within one and one-half miles on either side, or within the like distance of the terminus of any plank, macadamized, or gravel road, organized under "an act authorizing the construction of plank, macadamized, and gravel roads," approved May 12th, 1852, are not in conflict with section 1 of article 10 of our constitution, or with that part of sec-
- tion 22, article 4, which prohibits the General Assembly from passing local or special laws for the assessment and collection of taxes for state, county, township, or road purposes.....*Ibid.*
6. *Toll*.—That a toll is exacted to maintain the expenses of the highway and make it a free public road in time, does not render the law invalid.....*Ibid.*
 7. *Interest.—Statute Construed*.—The change in the interest law by the act of 1867 did not impair the obligation of a contract, but enabled parties to a contract previously voidable to avail themselves of the provisions of the new law and validated their acts done in accordance therewith. *Sparks et al. v. Clapperton*.....204
 8. *Fish Law*.—The act of March 9th, 1867 (Acts 1867, p. 128), "to provide for the protection of fish," &c., is constitutional. *The State v. Boone*.....225
- CONTINGENT REMAINDER.
- See WILL, 1, 2.*
- CONTINUANCE.
- Absent Witness.—Diligence.—Facilities for Travel*.—An affidavit of a party for a continuance on account of the absence of a witness, filed on Friday, showed that the witness resided in Vigo county (where the cause was pending), and was temporarily absent, at Evansville, and that the affiant was not aware of the materiality of the witness until that week.
Held, that this did not show diligence in procuring the attendance of the witness.
Held, also, that this court is bound to know that a few hours will take a messenger from Terre Haute to Evansville. *Ward v. Collyhan et ux.* 395
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- TION, 1, 2; SALE; FRAUDS, STATUTE OF, 1, 2; TRUST, 8.
- Infancy.* See BASTARDY, 4.
- Consideration.* See PROMISSORY NOTE, 1; VENDOR AND PURCHASER, 1, 15.
- Rescission.* See VENDOR AND PURCHASER, 22.
- Parol Contract.* See LANDLORD AND TENANT, 2.
- Interest.* See CONSTITUTIONAL LAW, 7.
1. *Construction of.*—A contract provided: "Both parties are to use due diligence in procuring all necessary logs and timber for the employment of said mill, and bear equal expense in procuring the same, and also to share equally in all expenses necessary in procuring the necessary hands and teams to run said mill, and are to share and share alike in the profits thereof." *Held*, that this provision did not require either party to furnish a definite part of the logs, teams, or hands. *Pence v. McPherson* 66
2. *Sale of Goods.—Earnest.—Part Payment.*—The parties to a contract for the sale of goods to be delivered at a future time, the price of which was more than fifty dollars, each delivered to the agent of both a check payable to said agent, as a forfeiture; the money, on failure of either party, to be paid over by the agent to the other. *Held*, that nothing was given in earnest to bind the bargain, or in part payment for the goods. *Noakes et al. v. Morey et al.* 103
3. *Memorandum.*—A memorandum made by the agent of both parties and signed by him in his own name, in the absence of the parties, not by their agreement, but at his own instance and for his own use and convenience, was not sufficient to take the case out of the statute of frauds. *Ibid.*
4. *Promise for Benefit of Third Person.*—The promise of A. to B. to pay B.'s indebtedness to C. may be enforced in equity by C., though not a party to the agreement. If the promise be accepted by C., he may maintain an action at law thereon. *Davis v. Calloway* 112
5. *Same.—Rescission of.*—Until such acceptance by C., the parties to the agreement may rescind it. *Ibid.*
6. *Consideration.*—A promise may be a sufficient consideration for a promise *Ibid.*
7. *Promissory Note.—Full Indorsement.—Alteration of.*—If a full indorsement of a promissory note be changed by striking out the name of the indorsee and inserting that of another person, without the consent of the indorser, such other person cannot, as indorsee, maintain an action against the indorser. *Piersol v. Grimes* 139
8. *Spoliation of Written Instrument.* The spoliation of an instrument by a stranger, without the knowledge or consent of the parties in interest cannot change the rights or liabilities of those parties. *Ibid.*
9. *Extension of Time.*—Suit on a note payable one day after date. Answer, setting out a written agreement by the parties, made three days after the execution of the note, that in consideration of a sale then made of a stock of goods, to the maker, he should first pay two other notes executed at the date of said agreement to the same payee, due six and twelve months after date, the same to be paid off with the proceeds of said goods, and that after they were so paid, the note in suit should be paid. *Held*, that this agreement did not extend the time at which the notes last executed became due, but did extend the time for the payment of the note in suit one year from the date of said agreement. *Jemison v. Walsh* 167
10. *Bond.—Repugnant Condition.*—Effect will be given to the intention of the parties to a bond as indicated by the whole instrument, notwithstanding repugnant words in the condition. *Marlett v. Wilson's Ex'r* 240
11. *Pleading.—Weakness of Mind.*—If a party be *compos mentis*, mere weakness or feebleness of mind does not render him incapable of making a contract, but may become a controlling circumstance, when connected with other facts tending to establish fraud, in giving character to the transaction, and rendering it fraudulent; but, to make a pleading good for that purpose, the *indicia* of fraud must be alleged. *Darnell v. Rowland* 342

12. Evidence.—Unsoundness of Mind. A witness testified that he had been acquainted with the plaintiff for several years, and said, "I think her mind was rather weak at the time of making the contract, but was improving. I did not think her mind was sufficient for me to contract with her."

Held, that this did not prove that the plaintiff was of unsound mind. *Ibid.*

13. Rescission.—Arbitration.—Suit by mortgagor against mortgagee to foreclose a mortgage of real estate for purchase money. Answer, setting up an agreement between the plaintiff and defendant to rescind the sale—that the latter should reconvey the mortgaged property, and the former surrender the notes given for purchase money—and to submit all other matters in controversy between them to arbitration; and alleging the tender of a deed by the defendant to the plaintiff in pursuance of said agreement.

Held, that if the facts proved on the trial showed, in contemplation of law, a delivery, instead of a tender of the deed, this fact could not aid the plaintiff, or weaken the defendant's defense.

Held, also, that a failure of the arbitration, especially without the fault of either party, could not affect the agreement to rescind, or deprive either of the parties of the right, by a proper suit, to compel a settlement of the accounts between them growing out of the rescission. *Bledsoe v. Radcl*.....354

14. Sunday.—Common Labor.—Where parties enter into a contract to be performed on Sunday by common labor, such contract, as to its performance on Sunday, is illegal and void. *Pete v. Wright et al.*.....476

15. Trusts and Trustees.—Power of Town to Loan.—Statute of Frauds.—Suit for a breach of duty by defendants as trustees, in surrendering and allowing to be canceled certain bonds executed by a railroad company, and held by defendants in trust to secure the repayment of certain sums advanced to the company by a town, the plaintiff's assignor.

Held, that the railroad company was not a necessary party defendant.

Held, also, the contract by the town with the company not being pro-

hibited by any statute, that the mere lack of power in the town to loan money could not be taken advantage of by the borrower, or by the defendants.

Held, also, that an acceptance of the trust in writing by the trustees was not necessary to fix their liability. *Ridenour et al. v. Wherritt*.485

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Disinterment of. *See CITY*, 12, 13.

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See PLEADING, 12.

New Trial on payment of. *See PRACTICE*, 8.

1. Bastardy.—Where the relatrix in a prosecution for bastardy dismisses the suit by entering of record an admission that provision for the maintenance of the child has been made to her satisfaction, it is error to adjudge costs against the defendant. *Dodd v. The State, ex rel. Ryan*.....76

2. Practice.—In order that the costs may be taxed against the plaintiff on the ground that his cause of action would have constituted a proper counter-claim in a previous action brought against him by the defendant, and, having been personally served with notice, he omitted to set up such counter-claim, these facts should be presented by answer before trial, and cannot properly be

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made available after verdict. *Poley v. Wood*.....407

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See Costs, 2.

COVENANT.

See VENDOR AND PURCHASER, 1.

Breach of. *See PLEADING*, 15, 16.

1. *Covenant of Warranty.—Incumbrance.—Evidence.*—Where, at the time of the conveyance of land by warranty deed in exchange for other land, it is agreed by the parties that the taxes due upon the lands so mutually exchanged shall be set off against each other, the taxes upon the land so conveyed by warranty deed are part of the consideration for such deed, and in an action against the vendor by the vendee, or one deriving title by warranty deed from the vendee, to recover money paid by the plaintiff to remove the incumbrance of the taxes so assumed by the vendee, parol proof of such contract concerning the taxes is admissible. *Robinius v. Lister et al.*.....142

2. *Same.—Satisfaction of Breach.*—If it be considered in such case that the warranty of the vendor is broken, still the vendee can thus agree upon the damages, and payment by the vendor, before action brought, of the taxes due on the land received by him in exchange will satisfy the breach. *Ibid.*

3. *Heirs.—Covenant of Ancestor.*—A tenant by courtesy sold, and by warranty deed conveyed, the land in which he had such estate.

Held, that after his death the heirs at law, to whom such real estate descended in fee from the wife, were entitled to the possession thereof, though they were children and heirs at law of the husband and had received from him, by descent, an estate of much greater value than the land so conveyed. *Hartman v. Lee et al.*281

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See RECOGNIZANCE, 1, 2; LIQUOR LAW.

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1. *Indictment.—Trespass on Land.*—An indictment charged that the defendant, "on, &c., at, &c., did unlawfully cut down and remove, on and from land belonging to M. S., in said county, one tree of the value of fifty cents, the property of M. S., without having license so to do from said M. S., or any other competent authority." *Held*, that this was a sufficiently certain description of the land upon which the trespass was committed. *Newland v. The State*.....111
2. *Indictment.—Qualifications of Grand Jurors.*—That an indictment does not show that the grand jury presenting it was composed of persons possessing the statutory qualifications is immaterial, the caption showing the indictment to have been found by the grand jury of a county named, in the Circuit Court of such county, and the record reciting that the grand jurors were sworn as required by law. *Stone v. The State*.....115
3. *Same.—Name of Grand Juror.*—Among the names of the grandjurors in the record was "A. J. Moore," and the record recited that "Andrew J. Moore" was appointed foreman. *Held* that there was nothing in the objection that the names of the members of the grand jury were not for this reason sufficiently set out. *Ibid.*
4. *Same.—Name Unknown.—Evidence.*—Where an indictment states that the Christian, or "given," name of the defendant is unknown to the grand jury, and there is no proof of the allegation on the trial, there can be no conviction. *Ibid.*
5. *Murder.—Habeas Corpus.—Bail Appeal.*—On appeal from the refusal of a judge to admit to bail a prisoner committed on a charge of murder, the Supreme Court will weigh the evidence and determine the facts, as if trying the case originally. *Ex parte Moore*.....197
6. *Same.—Malice.*—Where one person unlawfully and purposely kills

- another, malice, in the absence of rebutting evidence, is presumed from the act; but where no express malice is shown, and it appears that the act, though voluntary, was the result of a sudden heat, or transport of passion, upon a sufficient provocation, it rebuts the presumption of malice, which is an essential ingredient of the crime of murder in the first or second degree, and reduces the offense to manslaughter... *Ibid.*
7. *Same.*—The crime of murder requires the mind to have acted from deliberation and intelligence, and where it is clouded by passion, the result of a sufficient provocation, the killing is no more than manslaughter..... *Ibid.*
8. *Same.*—*Evidence.*—On an application by a person charged with murder in the first degree to be admitted to bail it appeared in evidence that the prisoner and the deceased, being friends, between whom there had been no previous difficulty, met in a saloon, where they engaged in playing cards and drinking beer until they both became intoxicated and fell into a dispute on politics, which resulted in coarse and abusive language between them, and the prisoner became excited and angry, and, leaving the card table, said he would go home, and attempted to go out, when the deceased, much the stronger man, perpetrated repeated personal violence and indignity upon the prisoner (who several times attempted to go away), sufficient to inflame his passion, and provoke him to extreme anger; that the prisoner, thus provoked, and greatly excited, escaping, at length, from the deceased, hastened to his own house, a short distance, and, not being absent from the saloon more than five minutes, returned with a revolver in his hand, with which he immediately shot and killed the deceased.
- Held,* that it was not clear that there was sufficient time between the provocation and the act for passion to cool and reason to resume control, or that the proof was evident or the presumption strong that the killing was malicious..... *Ibid.*
9. *Indictment.*—*Perjury.*—In an indictment for perjury, the offense was charged to have been committed by the defendant in testifying in a cause where "it was a material question whether the said A. had entered a credit of forty dollars on the promissory note then in controversy;" and the false testimony charged was, that "the credit on said note was twenty dollars, when, in truth and in fact, it was forty dollars."
- Held,* that the offense was not charged with sufficient certainty. *The State v. Thrift*..... 211
10. *Same.*—*Time.*—The indictment stated the time when the perjury was committed, thus: "at the April term of the Hendricks Circuit Court, in the year 1867."
- Held,* that this was sufficient, under section 56 of the criminal code. *Ibid.*
11. *Joint Offense.*—*Acquittal of one Defendant.*—The acquittal of one of two defendants charged with a joint offense does not operate as an acquittal of the other. *Fitznerider v. The State*..... 238
12. *Bill of Exceptions.*—The defendant in a criminal prosecution was allowed by the court a period extending beyond the term in which to file his bill of exceptions, which was filed in the clerk's office within the time so allowed, but not till after the expiration of the term.
- Held,* that, in the absence of anything to the contrary, this showed it was not presented to the judge within the time allowed by law, which requires that it be so presented at the time of the trial, or within such time during the term as the court may allow..... *Ibid.*
13. *Murder.*—*Habeas Corpus.*—*Bail Evidence.*—Upon an application by writ of *habeas corpus* by one indicted for murder in the first degree to be admitted to bail, it having appeared in evidence that the deceased kept a saloon; that the prisoner on the same evening had taken several drinks of whisky just before he came to the saloon of the deceased and entered the same, where he remained about two hours before the commission of the fatal act; and that during that time he took a number of drinks of beer, and was somewhat intoxicated; the prisoner, at the proper time, introduced a witness who testified that he knew the deceased, and had often bought liquor of him. The prisoner then offered

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- to prove by said witness that he, the witness, had frequently bought liquor of the deceased about and just before the time of said homicide; that the liquors which were kept and there offered for sale by the deceased were of a poisonous and noxious character; that they fired the brain of the witness and made him wild; and that once, while under the influence thereof, he was so frenzied thereby that he came near killing his own father by violence. *Held*, that the offered evidence was properly rejected. *Ex parte Halpine*..... 254
14. *Arraignment*.—*Waiver*.—By his personal appearance and agreement to submit the trial to the court, the defendant waives arraignment. *Molahan v. The State*..... 266
15. *Indictment*—*Trespass*.—An indictment charging the defendant with cutting, sawing, and removing from the land of another, without license, a certain quantity of ice of the value of ten dollars, the property of the owner of the land, it not appearing therefrom whether the ice was taken from a running stream or from a natural or artificial pond, was held good. *Query* as to what evidence would justify a conviction. *The State v. Pottmeyer*..... 287
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17. *Same*.—The indictment charged, with proper qualifying averments, that the defendant stated that his indebtedness was but \$2,000, when he knew it to be \$12,000; and that his property was unencumbered by debits, when, as he well knew, it was under executions and judgments to the amount of \$6,000. *Held*, that these were representations of material facts, and sufficient. *Ibid*.
- CUSTODY.
- Of children*. See JUDGMENT, 3.
- CUSTOM.
- See DEDICATION.*
- D.
- DAMAGES.
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- Railroad*.—If a railroad company in constructing its road make a ditch along the side thereof so as to carry off the water from the adjoining land to a natural channel, it is not bound to keep such ditch open, if the flow of the water is not changed injuriously to the owner of the land by the building of the road. *The Louisville, New Albany, and Chicago R. R. Co. v. McAfee*..... 291
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 2. *Same*.—*Residue after Foreclosure*. After foreclosure, by proceeding in rem, and sale of land mortgaged by a decedent in his lifetime to secure his promissory note, the residue of the debt does not cease to be a mortgage debt within the meaning of the exception in section 62, 2 G. & H. 501; and payment thereof may be claimed out of the other assets of the estate. *Ibid*.
 3. *Mortgage*.—The personal property

- of a decedent is the primary fund for the payment of debts, and the filing of a note made by the decedent in his lifetime, and secured by a mortgage on his real estate, as a claim against his estate, entitles the holder to a *pro rata* dividend out of the assets. *Clarke v. Henshaw*..144
4. *Same.—Sale by Administrator to Discharge Lien.*—Nothing less than full payment of such a note releases the mortgage, though the holder of the note have notice of the sale of the mortgaged property by the administrator, under an order of court, and receive his *pro rata* portion of the proceeds, unless the property be sold under the provisions of the statute (2 G. & II. 512, sec. 89) authorizing a sale for the purpose of discharging the lien.....*Ibid.*
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9. *Order of Payment.*—Judgments which are liens upon a decedent's real estate and mortgages thereon may in every case be paid at once, and must be paid before general debts, which may not be paid until a year has expired from the first granting of letters of administration.....*Ibid.*
10. *Distribution Without Personal Representative.*—The heirs to whom, under the laws of descent and distribution of the domicil of an intestate, his personal estate descends, subject only to the payment of his debts, are entitled to its possession, subject to the rights of the personal representative; but where there are no debts, if the heirs can agree upon a distribution, there is no absolute necessity for the appointment of a personal representative. The heir entitled by such distribution to a note secured by a trust deed, belonging to the assets, or his assignee, may enforce payment of the claim in equity. *Martin et ux. v. Reed*..218
11. *Trustee.—Assignment by.*—A deed in the nature of a mortgage on real estate to secure the payment of a note was made to a person, as trustee, who afterwards became a beneficiary of the trust by descent, as one of the two heirs at law of the legatee of the *cestui que trust*, and assigned the note and trust deed to his co-heir, without administration on the estate of the legatee. *Held*, that a suit to foreclose the trust deed might be maintained in equity by one claiming through such assignment.....*Ibid.*
12. *Collateral Proceeding.—Oaths of Administrator and Sureties.*—The fact that the oath of an administrator, on taking letters, his affidavit as to the value of the decedent's property, and the affidavits of his sureties as to the value of their property, have been sworn to before a notary public, instead of the clerk, does not render the administration void. *Pickens, Adm'r, v. Hill*..209
13. *Same.—Husband and Wife.*—If a wife die, intestate, leaving no child or any descendant therof, and no father or mother, the husband is entitled, without administration, to the possession of property received by her from a settlement by administration, not void, of the estate of a

- former husband, as against a subsequent administrator of the estate of such former husband.....*Ibid.*
14. *Covenant of Ancestor.*—After the death of the grantor in a deed of conveyance of real estate, a claim for damages upon the breach of a covenant of warranty therein must be filed against his estate as provided in section 62, 2 G. & H. 501; and if not so filed is liable to become barred. *Hartman v. Lee et al.*.....281
15. *Liability of Heirs and Devisees.* The only statutory provisions making the heirs and devisees liable in such cases after settlement of the decedent's estate, seem to be those commencing with section 178, 2 G. & H. 534.....*Ibid.*
16. *Claims.*—All claims against decedents' estates not excepted by section 62, 2 G. & H. 501, if not filed as required by that section, are barred, except as provided by section 178 of the same act. *Ratcliff v. Leunig et al.*.....289
17. *Principal and Surety.*—The maker of a promissory note and the surety thereon both died, the former intestate, the latter testate. The holder of the note filed it as a claim against the estate of the maker only, on final settlement of which he received partpayment, this estate being insolvent. After both estates had been finally settled, the creditor brought suit against the devisees of the surety for the balance due on the note. The complaint did not bring the case within section 178, 2 G. & H. 534.
Held, that the suit was barred.
Held, also, that the facts that the claim was filed against the estate of the principal, and that it could not be known what portion of the note would be paid by that estate until final settlement thereof, did not prevent the creditor from filing the claim against the estate of the surety also, at any time after the grant of letters testamentary, or excuse him from so filing it.....*Ibid.*
18. *Witness.*—On the trial of a claim against a decedent's estate for the amount of a legacy received by the decedent in his lifetime, in trust for the claimant, the plaintiff is not a competent witness, unless called by the adverse party or by the court. *Reed's Adm'r v. Reed*.....313
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1. *User.*—In order to show by user a dedication of the soil of an individual to public use, it must have been a user by the public adverse and exclusive of the use and enjoyment of the property by the proprietor, and not a mere use by the public under and in connection with its use by the owner in any manner desired by him. *Talbott et al. v. Grace et al.*389
2. *Public Landings.—Prescription.*—The right to land boats and load and unload freight, and thus encumber the land of an individual adjoining a navigable river, cannot be acquired by the public by prescription or custom. Whoever claims such right by long usage must prescribe in a *que estate*.....*Ibid.*

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- From husband to wife.* *See HUSBAND AND WIFE*, 1.
To husband and wife. *See HUSBAND AND WIFE*, 3, 4.
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1. *Quitclaim.*—A deed in which the grantor uses the words "release, remise, and forever quit claim" passes the fee to the alienee. *Rowe et al. v. Beckett et al.*.....154
2. *Delivery of.*—The parties to a deed of conveyance of real estate had it prepared, and agreed that it should be signed and acknowledged, and left with a justice of the peace for the grantee, all of which was done.
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1. *Practice.*—In an action by a married woman concerning her separate property, her husband being joined as plaintiff, the deposition of the husband, appearing as such on its face, was admitted in evidence over the objection of the defendant, made for the first time after entering on the trial.

Held, that this ruling was correct.
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2. *Parties*—Where a party to a suit is a competent witness, his deposition may be taken under the rules governing the taking of the depositions of other witnesses. *Bourgette et al. v. Hubinger et al.*.....296

3. *Exhibits.*—On the trial the court suppressed the answer to this question in a deposition: "State what would be the duty of a commission merchant in this city by the custom of trade here, in reference to the sale of a lot of lard upon the receipt from the owner of such letters as are hereto attached, and marked 'Exhibit A and B.'"

Held, that it was sufficient to justify the court in excluding the answer, that no such letters as were set forth in the exhibits were introduced on the trial, were there no legal objection to a witness' placing a construction upon a written paper.
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1. *Widow.*—*Limitation of Actions.*—Petition for partition, filed January 15th, 1868, by the brothers and sisters of J. L., who died, intestate, in March, 1865, seized in fee of the land sought to be partitioned, leaving a widow, the defendant, but no child or father or mother.

Held, that by the act of March 4th, 1853 (Acts 1853, p. 55), the petitioners were entitled to one undivided half of such land, but that sections 1, 2, 3, and 4 of said act, not being in conformity with the ruling in *Langdon v. Applegate*, 5 Ind. 327, were repealed by the act of March 9th, 1867 (Acts 1867, p. 204), leaving in force the provision of the act of May 14th, 1852 (1 G. & H. 296, sec. 26), that in such case the widow is entitled to the entire estate—the commencement of actions arising under the law repealed being limited to ninety days from the passage of said act of 1867, which to the petitioners was a reasonable time. *Leard et al. v. Leard*.....171

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- whole complaint, alleging payment of a part of the debt secured by the mortgage. Reply of denial to this paragraph. Motion by defendant to discontinue the action because the reply had made an issue upon the defective answer.
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1. A draining association, organized under the act of June 12th, 1852, is not a corporation until the articles of association have been in fact recorded in the recorder's office of the county or counties in which the contemplated work is situated. *The New Eel River Draining Ass'n v. Durbin*.....173
2. *Assessment*.—Procuring an assessment to be made upon lands to aid in the construction of a drain is a corporate act, and cannot be legally done until after the articles of association have been recorded. *Ibid.*
3. *Same*.—*Practice*.—In a suit by a draining association upon an assessment, the defendant (not being a member of the association, and not having contracted with it as a corporation) may plead *nul fili corporacion* at the date of the assessment.....*Ibid.*
4. *Same*.—*Excessive Assessment*.—The fact that an assessment, otherwise valid, is too high, will not defeat an action thereon, but only go to reduce the amount of recovery....*Ibid.*
5. *Assessment*.—A draining association under the laws of this State can have no corporate existence or power to make a valid assessment upon the lands affected by the drain,

- until its articles of association have been recorded. *The New Eel River Draining Ass'n v. Carriger*.....213
6. *Same*.—*Pleading*.—In an action by a draining association to enforce payment of an assessment, the complaint need not state in terms the use for which the money is required, if it is evident from the whole complaint that it is for the construction of the drain referred to in the directors' order of payment set out in the complaint. *Large v. The Keen's Creek Draining Co.*.....263
 7. *Affidavit of Appraisers*.—An affidavit that "the foregoing appraisement is correct to the best of our judgment," is sufficient under section 12, 1 G. & H. 304, requiring an affidavit "that the same is in all respects a true assessment to the best of their judgment and belief".....*Ibid.*
 8. *Description of the Drain*.—The complaint against a person not a member of the association must describe the commencement, course, and terminus of the drain.....*Ibid.*
 9. *Right of Way*.—The fact that the right of way has not been procured will not bar the suit.....*Ibid.*

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See CITY, 10; *VENDOR AND PURCHASER*, 6; *ESTOPPEL*, 5.

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See GRAVEL ROAD, 1, 2, 5.

1. *By Deed*.—A. and B. were partners in a grist mill, to which was permanently attached a circular saw-mill, in which C., who had no ownership in the real estate, held an interest. A. and B. sold, and by their joint deed conveyed, the entire property, including, with C.'s assent, the saw-mill.
Held, in a suit by C. against A., the

- surviving partner, to recover the value of the saw-mill, that the latter was estopped from saying that he did not acquiesce in its sale. *Pence v. McPherson*.....66
2. *In Pais*.—A property-holder cannot quietly permit money to be expended in work which benefits his land, under a contract with a city, and then deny the power of the city to make the contract. *Hellenkamp v. The City of Lafayette*.....192
3. *Same*.—*Fraud*.—Where one of several defendants had a good defense, and by the fraudulent device of the plaintiff was prevented from making it, and also from making his motion within the time allowed by law, to set aside the judgment for mistake, inadvertence, surprise, or excusable neglect; *held*, that the plaintiff and his administrator were estopped from enforcing the judgment against such defendant. *Johnson's Adm'r v. Uncrav*.....435
4. *Same*.—*Excusable Delay*.—Where the plaintiff did not attempt to enforce such judgment, but repeatedly asserted that as to such defendant it was released and satisfied; the plaintiff's administrator, seeking the enforcement of the judgment for the first time, could not complain that such defendant had delayed ten years in asserting his right.....*Ibid.*
5. *Judgment—Process*.—In a proceeding for partition of real estate in the Probate Court, in 1848, a subpoena in chancery was issued August 21st, served August 24th, and judgment was taken by default September 22d. The complaint was at law (the court having also chancery powers, the statute requiring service of thirty days in chancery). After the interlocutory order of partition was made and commissioners were appointed and process was issued to them, the court, on motion, without notice to parties, permitted the petition to be amended by the insertion of other lands, and changed the order and process to agree with the amended petition. The commissioners were not re-sworn. Certain real estate owned in fee by one of the defendants, a married woman, whose husband was not a party, was set off to her as and for her dower, the remainder not being disposed of.
- Held*, that such married woman was not estopped by this proceeding and judgment from asserting her right to the fee simple of such real estate. *Falls v. Hawthorn*.....444
6. *Heir—Conveyance—Consideration*. A., the owner of certain real estate, voluntarily refused to pay the taxes thereon, and designedly permitted it to be returned as delinquent and to be sold for taxes, and procured B. to buy it in at such sale and to assign the certificate of purchase to the daughter of A., and procured the county auditor to convey the land to said daughter, under the certificate, with intent, in consideration of natural love and affection, to thereby invest her with the title to the land as a voluntary and absolute gift, and not as an advancement.
- Held*, in a suit, after A.'s death, against said daughter by the other heirs at law of A., for partition of said land, that these facts did not estop the plaintiff from denying the validity of the sale for taxes or the title of the daughter under it. *Voorhees et ux. v. Hushaw et al.*..488

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1. *Conveyance from Husband to Wife*. A deed of conveyance of real estate from husband to wife, though void in law, may be upheld by a court of equity, whose duty it is, in such case, to inquire into the circumstances under which it was executed; in which inquiry the circumstances of the husband at the time of the conveyance constitute an important element, and evidence of his

- indebtedness at that time is admissible. *Frank et al. v. Kessler et ux* 8
2. *Partnership*.—Where the issue was, whether a partnership in a contract for street improvement existed between the plaintiff and defendant, as averred by the defendant, or the plaintiff was simply a surety for the defendant upon such contract, and, as such, advanced the money sued for to enable the defendant to comply with his contract, the court refused to permit the defendant to introduce in evidence a receipt for money paid on account of the work under said contract, part of which was paid by the plaintiff and part by the defendant, at the grocery of the plaintiff, on the day the receipt was dated—the plaintiff, defendant, and person to whom the money was paid being present—which receipt was drawn up at the same time by the defendant in the name of both parties, and signed by the person receiving the money, in his own handwriting, in the presence of the plaintiff and defendant.
Held, that the receipt was properly excluded. *Ehrman v. Kramer* 26
3. *Weight of*.—The weight to be given to the evidence of witnesses cannot be determined from the record. *Ibid.*
4. *Resulting Trust*.—Parol evidence to establish a resulting trust in land held by an absolute conveyance, after a long lapse of time and the death of the nominal purchaser, must be strong and clearly relevant. *Collier et al v. Collier et al* 32
5. *Admission of—Slender*.—In a suit for slander, in which there had been a change of venue, the plaintiff was permitted, over the objection of the defendant, to prove that the latter had said to the witness that "he wanted to bring the case here on a change of venue, because he wanted H. (the plaintiff) to have some trouble as well as him all."
Held, that this was an error of law, for which the defendant was entitled to a new trial. *Peterson v. Hutchinson* 38
6. *Principal and Agent*.—*Admission*. The declarations or admissions of an agent are evidence against his principal, only when they are made as to a business matter within the scope of his agency, and which is being transacted at the time. *The Lafayette & Indpls R. R. Co. et al. v. Ehrman* 83
7. *Witness—Character of*.—Where there has been an attempt to impeach a witness by proof of statements out of court contrary to what he has testified at the trial, the party calling him has the right to sustain him by proof of general good character for truth. *Harris v. The State* 131
8. *Deposition*.—In an action by a married woman concerning her separate property, her husband being joined as plaintiff, the deposition of the husband, appearing as such on its face, was admitted in evidence over the objection of the defendant, made for the first time after entering on the trial.
Held, that this ruling was correct. *Robinius v. Lister et al* 142
9. *Opinion of Witness not an Expert*. Any witness, not an expert, who knows the facts personally, may give an opinion in a matter requiring skill, stating also the facts on which he bases his opinion. *City of Indianapolis v. Huffer* 235
10. *Weight of—Supreme Court*.—It is not the province of the Supreme Court to weigh the evidence and determine the preponderance thereof. Before it will interfere upon the evidence alone, it must appear by the record, not merely that the finding was against the weight of evidence, but that it was wrong beyond any question whatever. *The Indpls, Cincinnati, and Lafayette R. R. Co. v. Trisler* 243
11. *Introduction of*.—In the absence of a contrary showing, the Supreme Court will presume that the evidence was introduced in its proper order on the trial, and was relevant. *Onstat v. Ream* 259
12. *Same*.—There is no error in refusing to allow the defendant to introduce testimony in reply to strictly rebutting evidence introduced by the plaintiff. *Ibid.*
13. *Documentary Evidence—Authentication*.—A tract-book kept in a recorder's office, admitted in evidence, had the following heading: "List of lands sold in that part of Delaware county lying in the Indianapolis district, from the first

- sale up to the 1st of January, 1841;" and the following certificate of authentication was attached thereto: "Auditor's office, Indianapolis, April 27th, 1841, I, Morris Morris, Auditor of Public Accounts, do hereby certify that the foregoing list of lands is correctly transcribed from the tract-book on file in my office. M. Morris, A. P. A."
- Held*, that this was a sufficient authentication under the act of March 6th, 1861, 2 G. & H. 181, sec. 1. *Keesling v. Truitt et al.*.....306
14. *Judgment*.—Where, in a suit by the assignee against the assignor of a promissory note, the plaintiff put in evidence a judgment recovered by him against the maker, and a summons showing the commencement of the suit which resulted in the judgment, but omitted to introduce any other part of the record; *Held*, that as it did not appear that the judgment introduced was upon the note in suit, this evidence was insufficient to bind the assignor. *Miller v. Deaver*.....371
15. *Promissory Note.—General Denial*. Where, in a suit on a promissory note, the general denial is pleaded in answer, there can be no recovery on the note without proper evidence of its contents. *Stevens v. Anderson, Adm'r*.....391
16. *Trusts and Trustees.—Lost Writing*.—At a regularly organized public meeting of the citizens of a township, called and held to raise money, volunteers, and substitutes, for the purpose of relieving the township of an impending draft for soldiers, various citizens agreed, each for himself, to pay divers sums for such purpose, and among them A., who was subject to the draft, promised to pay a certain sum on condition the township should be so relieved; if not, the money to be refunded. By the aid of the money so raised and promises so made, or by such money, promises, and otherwise, the township was relieved. Certain citizens were appointed by the meeting, to collect and receipt for the money so paid and promised, and to apply the same so as to effect the release of the township; and they collected the several amounts and so applied them, to the satisfaction of the promisors, including A., except the sum promised by A., who refused to pay on their demand.
- Held*, that the persons so appointed were trustees of an express trust, and entitled to sue on the promise of A.
- Held*, also, that the minutes of the meeting being lost, it was proper to introduce parol evidence of their contents; and the memorandum kept by the clerk of the meeting, of the names and the amounts pledged, was only a part of the minutes. *Dix v. Akers et al.*.....431
17. *Contents of Writing*.—The rule excluding parol evidence of the contents of a written instrument does not apply to a writing which is a mere incident connected collaterally with a question in issue. *Carter et al v. Pomeroy et al.*.....438
18. *Promissory Note.—Execution of*.—The question of the execution of a promissory note is one of fact for the jury, in the determination of which it is proper that the note should be in evidence.*Ibid.*
19. *Deposition.—Exhibits*.—On the trial, the court suppressed the answer to this question in a deposition: "State what would be the duty of a commission merchant in this city, by the custom of trade here, in reference to the sale of a lot of lard upon the receipt from the owner of such letters as are hereto attached and marked 'Exhibit A and B.' "
- Held*, that it was sufficient to justify the court in excluding the answer, that no such letters as were set forth in the exhibits were introduced on the trial, were there no legal objection to a witness' placing a construction upon a written paper. *Huston v. Roots et al.*.....461

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See PROCEEDINGS SUPPLEMENTARY TO.

Different Executions against the same Person.—Of two executions in the hands of a sheriff in favor of different judgment plaintiffs against the same judgment defendant, it is the officer's duty, if not otherwise directed, to first levy the one first placed in his hands; and if he has failed to do his duty, by levying and

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collecting the later execution and paying over the money, leaving the former one unsatisfied, it is no defense to a suit against him and the sureties on his official bond for his failure to levy and collect the other execution, that the execution defendant had, at the time the same was issued, and still has, sufficient property to satisfy it. *Bragg et al. v. The State, ex rel. Davis et al.* A27

EXECUTORY DEVISE.

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F.

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See CRIMINAL LAW, 16, 17.

FALSE RETURN.

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FISH.

Fish Law.—The act of March 9th, 1867 (Acts 1867, p. 128), "to provide for the protection of fish," &c., is constitutional. *The State v. Boone*.....225

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See COLLATERAL PROCEEDING, 2; ESTOPPEL, 3, 4; GUARDIAN AND WARD, 4; SHERIFF'S SALE, 2; PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 1; TRUST, 3.

1. *Fromissory Note*.—*Fraudulent Persuasion of*.—Where a note payable in bank is indorsed upon the

representation of the payee that, if it be made and so indorsed, he will have it discounted at a certain bank, with which he falsely pretends to be negotiating for that purpose, and with the proceeds take up a matured note given by the same maker to the same payee, but the payee, instead of having it so discounted, retains it in his own possession, there is a want of consideration to support it against the indorser in the hands of the payee. *Armstrong v. Cook*.....22

2. *Limitation of Actions*.—The statute providing that actions for relief against frauds must be commenced within six years after the cause of action has accrued (2 G. & H. 156, sec. 210), greatly changes the law as it existed when *Raymond v. Simonson*, 4 Blackf. 77, was decided. It applies as well to suits in equity as at law; and under it time begins to run before discovery of the cause of action, unless the defendant shall conceal his liability. *Pilcher et al. v. Flinn*.....202

3. *Pleading*.—It is not enough that a pleader characterize a transaction as fraudulent by the simple use of that word; he must allege such facts as show that conclusion. *Curry et al. v. Keyser*.....214

4. *Sale*.—*Misrepresentations*.—Where a misrepresentation as to the nature and quantity of property sold amounted only to an opinion of the seller, who had no notice or reason to suspect that the buyer was relying upon his estimate, and no special qualification in the particular matter for making a more accurate estimate than the buyer, and it did not appear that the buyer, who relied upon such representation, had been injured; *held*, that there was no fraud.*Ibid.*

5. *Pleading*.—The general allegation of fraud is not of itself sufficient to raise such an issue. The facts—the acts and circumstances—which constitute the fraud must be alleged. *Darnell v. Rowland*.....342

6. *Same*.—*Weakness of Mind*.—If a party be *compos mentis*, mere weakness or feebleness of mind does not render him incapable of making a contract, but may become a controlling circumstance, when connected with other facts tending

to establish fraud, in giving character to the transaction, and rendering it fraudulent; but, to make a pleading good for that purpose, the *indicia* of fraud must be alleged. *Ibid.*

FRAUDS, STATUTE OF.

See LANDLORD AND TENANT, 2; SALE, 1, 2; TRUST, 9.

1. *Contract to Convey Land.*—In a suit for specific performance of a contract to convey real estate the complaint showed that the agreement to convey was not in writing, and there was no averment that possession of the land was given under the contract.

Held, that an answer of general denial did not raise the issue of the statute of frauds. *Livesey et al. v. Livesey*.....398

2. *Same.—Waiver.*—If in such case the defendant does not insist on the statute of frauds, and the parol agreement is proved, or is admitted by the defendant, he thereby waives the requirements of the statute. *Ibid.*

FRAUDULENT CONVEYANCE.

See HUSBAND AND WIFE, 1, 2.

G.

GEOGRAPHY.

See CONTINUANCE.

GRAND JUROR.

See CRIMINAL LAW, 2, 3.

GRAVEL ROAD.

See ASSESSMENT FOR LOCAL IMPROVEMENT.

1. *Way.—Trespass.*—A proceeding in regular form before a justice of the peace, to obtain the right of way for a gravel road company, resulted in a judgment on the report of the jury, that no damages would be sustained by the owner of the land. From this judgment the owner appealed to the Circuit Court, where, on his motion, the cause was dismissed over the objection of the

company, and the company appealed from the judgment of dismissal to the Supreme Court. Pending this appeal, the owner sued the company for trespass.

Held, that the proceeding before the justice gave the right of entry, which the order of dismissal could not divest. *Jeffries et al. v. Macconnan*.....226

2. *Estopel by Record.*—It may be that but for the appeal to the Supreme Court the company would have been estopped by the judgment of dismissal from showing that the proceeding before the justice was regular. *Ibid.*

3. *Articles of Association.—Name.*—The articles of association of a proposed gravel road company, which it was attempted to organize under the act of May 12th, 1852, set forth no name for the corporation. The words "Fairview Turnpike" were placed at the head of the articles.

Held, that this was not a compliance with the statute (1 G. & H. 474, sec. 1) requiring the name assumed to be set forth, without which there can be no corporation. *Piper et al. v. Rhodes et al.*.....309

4. *Assessments.*—An order of the board of county commissioners appointing assessors to make an assessment under the act of March 11th, 1867, for such pretended corporation, was a nullity. *Ibid.*

5. *Estopel.*—The owners of land proposed to be assessed, not being shareholders, and not having contracted with the company as a corporation, were not estopped, in a suit to enjoin the collection of an assessment, from denying the corporate existence of the company. *Ibid.*

6. *Payment of Subscriptions.—Directors.*—Under the act of May 12th, 1852, it is the province of the directors, and not of the stockholders, to require payment from subscribers to the capital stock. *Ibid.*

7. *Board of County Commissioners. Appeal from.*—Application to the board of county commissioners for permission to organize an association and construct a gravel road under the act of 1865 (Reg. Sess. p. 90). A paper called a defense was filed by persons alleged therein to be owners of land which would be subject to be taxed for the con-

struction of the proposed road, urging objections to the application. The application was granted. Appeal to the Circuit Court, where, on motion of the appellees, the appeal was dismissed.

Held, that an appeal might have been taken under section 31, 1 G. & H. 253, by filing with the county auditor an affidavit as required by that section; but, *Held*, also, that as it did not appear that any such affidavit was filed, or that the persons taking the appeal were in a legal sense parties to the proceedings before the commissioners, the appeal was properly dismissed.

Query, whether the commissioners might admit persons having an interest in the subject of the application to make themselves parties defendants, upon proper petition verified by affidavit. *Jones et al. v. Theiss et al.*.....311

GUARANTOR.

Extension of Time.—An agreement, made while the interest law of 1865 was in force, by a creditor with the principal debtor, without the consent of the surety or the guarantor, to give a limited time after the debt became due, in consideration of the payment in advance of four per cent. in excess of six per cent. interest, released the surety and the guarantor. *Cross v. Wood et al.*.....378

GUARDIAN AND WARD.

1. *Foreign and Resident Guardians*.—By the common law, letters of guardianship are local to the jurisdiction in which they are granted, and a guardian of the person and estate of a minor cannot, by virtue of his letters granted by a proper court in another state where he and the ward are domiciled, claim as a *legal right* to recover money belonging to the ward in the hands of a guardian of the estate of such ward resident in this State. But the Court of Common Pleas, possessing general chancery jurisdiction in such cases, and having jurisdiction of the resident guardian and

the funds in his hands belonging to the ward, has power to order that such funds be transmitted or paid over to the guardian in another state where the ward is domiciled. *Earl, Guard., v. Dresser, Guard.*..11

2. *Same.—Statute*.—Section 107 of chapter 35, Revised Statutes 1843, authorizing the court having jurisdiction to make such order respecting the delivery and payment of property and moneys to the non-resident guardians of non-resident wards as to the court may seem just and right, was but declaratory of what the law was in that respect before its enactment.*Ibid.*

3. *Same.—Judicial Discretion*.—The question of the exercise of this power is addressed to the sound judicial discretion of the court, to be determined upon principles of comity, equity, and justice; and where it appears for the best interest of the ward, and it does not appear that any principle of public policy will be violated, or the legal rights of any of our citizens injured or impaired, the court should grant the order.*Ibid.*

4. *Vendor and Purchaser.—Guardian's Sale of Real Estate.—Fraud*. A guardian, for the purpose of obtaining to himself the title to the real estate of his ward, procured an order of sale, and sold the land at public sale, but made report that he had sold at private sale as ordered by the court. He procured a person to bid off the land for his benefit and discouraged and prevented others from bidding. The purchaser assigned to the guardian the certificate of purchase given him by the guardian, and received back his notes for the deferred payments, the first payment not having been made, though the guardian had reported full payment. The commissioner appointed to make conveyance executed a deed to the guardian as assigned of the purchaser. The proceedings as they appeared upon the record were regular and valid.

Held, that, as between the guardian and ward, the title of the former was bad, but not so the title of a purchaser from the guardian for a valuable consideration and without

notice of the fraud, or the title of the vendee of such a purchaser.
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2. *Same.—Supervisor. — Trespass.*—Trespass for entering the enclosed land of the plaintiff and removing fences. Answer, justifying the entry and the removal of the fences under an order of the board of county commissioners locating and establishing a township road.

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3. *Same.—Order of Location.—Description of.*—In a proceeding for the location of a highway, the final order of the board of commissioners was as follows: "And the board, having duly examined and considered said report, accept and approve the same, and it is now here ordered that *said road* be, and the same is hereby located to the width of twenty-five feet." The beginning, terminus, course, and distance of the road were described in the petition.

Held, that the order was sufficiently definite.....*Ibid.*

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1. *Conveyance from Husband to Wife.*

—*Evidence.*—A deed of conveyance of real estate from husband to wife, though void in law, may be upheld by a court of equity, whose duty it is, in such case, to inquire into the circumstances under which it was executed; in which inquiry the circumstances of the husband at the time of the conveyance constitute an important element, and evidence of his indebtedness at that time is admissible. *Frank et al. v. Kessler et ux.*.....8

2. *Practice.—Joiner of Causes.*—A claim to set aside a conveyance of real estate from husband to wife for fraud against creditors, may be joined with a claim against the husband arising out of contract. *Ibid.*

3. *Conveyance to Husband and Wife. Common Law.*—At common law, if a conveyance of real estate is made to a man and his wife, they are not joint tenants or tenants in common, but both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor. *Arnold et al. v. Arnold*.....305

4. *Same.—Statute.*—Such was the law under the act of January 2d, 1818 (Rev. Stat., 1838, 398), and such is the law under the statutes of 1852 (1 G. & H. 259, secs. 7, 8).

5. *Wife's Separate Property.—Agency of Husband.*—A married woman owned in fee, as her separate property, land occupied as a farm by herself and husband, and used and cultivated by the latter, who, with his wife's knowledge and assent, used, sold, and marketed the annual products as his own, and used the proceeds in the support of the family. With her assent, he rented a field to be planted in corn, furnishing the team, plows, and seed corn to the tenant, who was to have one-third

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- of the crop. The husband sold two-thirds of the growing crop in payment of an account for medical services rendered by the purchaser to the husband and family. Afterwards, and before the corn was ripe, the wife obtained a divorce. *Held*, in a suit by the wife against the purchaser for entering the close and gathering and carrying away the ripened corn, that the sale was valid, and was not affected by the subsequent divorce. *Cunningham v. Mitchell*.....262
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5. *Decedents' Estates.*—The personal property of a decedent is the primary fund for the payment of debts, and the filing of a note made by the decedent in his lifetime, and secured by a mortgage on his real estate, as a claim against his estate, entitles the holder to a *pro rata* dividend out of the assets. *Clarke v. Henshaw*..... 144
6. *Same.—Sale by Administrator to Discharge Lien.*—Nothing less than full payment of such a note releases the mortgage, though the holder of the note have notice of the sale of the mortgaged property by the administrator, under an order of court, and receive his *pro rata* portion of the proceeds, unless the property be sold under the provisions of the statute (2 G. & H. 512, sec. 89) authorizing a sale for the purpose of discharging the lien..... *Ibid.*
7. *Foreclosure.*—A note secured by mortgage on real estate was surrendered, and the mortgage satisfied of record by the mortgagee, upon the representation of the mortgagor that he had conveyed the mortgaged property to a third person, from whom the mortgagee thereupon accepted a new mortgage on said real estate for the debt. *Held*, that the deed from the original mortgagor to such third person, the parties thereto being satisfied that it should stand, could not be disturbed at the instance of the mortgagee, seeking to revive and foreclose the first mortgage. *Fewell et al. v. Kessler*..... 195
8. *Same.—Trustee.—Assignment by.*—A deed in the nature of a mortgage on real estate to secure the payment of a note was made to a person, as trustee, who afterwards became a beneficiary of the trust by descent, as one of the two heirs at law of the legatees of the *cestui que trust*, and assigned the note and trust deed to his co-heir, without administration on the estate of the legatee.
- Held*, that a suit to foreclose the trust deed might be maintained in equity by one claiming through such assignment. *Martin et ux. v. Reed*..... 213
9. *Foreclosure.—Parties.*—In the foreclosure of a mortgage executed by husband and wife, the wife is a proper party defendant. *Chambers et ux. v. Nicholson*..... 249
10. *Redemption.*—A mortgage of real estate executed and recorded after a decree of foreclosure on a former mortgage, but before sale under such decree, does not give the junior mortgagee the right to redeem. *Harlock v. Barnhizer et al.*..... 370
11. *Same.*—Suit by a junior mortgagee to redeem the mortgaged premises from a sale under a decree of foreclosure on a prior mortgage, to which decree the junior mortgagee, whose mortgage was unrecorded, was not a party. The complaint did not aver that the holder of the senior mortgage had notice of the unrecorded mortgage, or that the purchaser had such notice. *Held*, that the complaint was bad on demurrer..... *Ibid.*
12. *Mortgage.—Conditional Sale.—Construction of.—Evidence.*—It is settled in this State that parol evidence is admissible to aid in distinguishing between a conditional sale and a mortgage. *Heath v. Williams*..... 495
13. *Same.*—In a case of doubt, equity will construe a writing as a mortgage rather than a conditional sale..... *Ibid.*
14. *Same.*—On the 25th of March, 1858, J. H. and B. W. executed the following instruments, the land therein mentioned having been conveyed by B. W. to D. H. on the 24th of February, 1858, by a deed absolute on its face: "This is to certify that I am to make or cause to be made, a deed for 360 acres of land in Benton county, Indiana, the land B. W. sold to me for D. H., on the payment of all money to said D. H. that he pays on said land; that is, if the money is paid on or before the 23d of February, 1859. (Signed) J. H." "This is to certify that I, B. W., sold to J. H.

for D. H., on the 23d day of February, 1858, 360 acres of land in Benton county, Indiana, for \$5,400; and I agree to receive all receipts where money is paid for claims against the land, as payments on the above land mentioned; and I agree to take a note B. B. & Co. hold against me in payment on said land; and I give full possession from day of sale. (Signed) B. W. Received on the above land \$1,007.67. (Signed) B. W."

Held, upon these writings and parol evidence showing that the conveyance was intended to be a security for the payment of money, that the transaction was a mortgage.....*Ibid.*

MUNICIPAL CORPORATION.

See CITY; TRUST, 9.

MURDER.

See CRIMINAL LAW, 5, 6, 7, 8, 13.

N.

NAME.

See ADATEMENT, 2; GRAVEL ROAD, 3.

1. *Name of Grand Juror.*—Among the names of the grand jurors in the record was "A. J. Moore," and the record recited, that "Andrew J. Moore" was appointed foreman.

Held, that there was nothing in the objection, that the names of the members of the grand jury were not, for this reason, sufficiently set out. *Stone v. The State*.....115

2. *Name Unknown.*—Evidence.—Where an indictment states that the Christian, or "given," name of the defendant is unknown to the grand jury, and there is no proof of the allegation on the trial, there can be no conviction.....*Ibid.*

NECESSITY.

Work of. See SUNDAY, 1, 2.

NEGLIGENCE.

See CITY, 7, 8; COMMON CARRIER, 1, 2.

1. *Excavation in Sidewalk of City. Injury to Person.*—The owner of a lot in a city, having, by permission

of the city authorities, caused an excavation to be made in a sidewalk, along which people are accustomed to pass, for the purpose of constructing an area by the side of a building to be erected on such lot, it is his duty to see that proper protection against injury to persons passing along the sidewalk is provided; and if, in consequence of such excavation being insufficiently guarded, a passer on the sidewalk falls in and is injured, without his own fault, the lot at the time, for the purpose of constructing the area and erecting the building under a contract, being in the exclusive possession of a third person, the contractor, who has complied with the stipulations of his contract, the owner is liable for the injury so received. *Silvers v. Nerdlinger et al.*.....53

2. *Contractor.—Recovery over Against.* Where there is no provision in the contract that the contractor shall have exclusive possession of the lot, or stipulation that he shall keep the area properly guarded during the progress of the work, as between him and the owner, there is no implied obligation that the contractor shall keep it so guarded, whatever liability he may incur to others by leaving it unguarded; and, having performed his work according to the contract, he is not liable over to the owner for damages recovered against the latter for such injury.....*Ibid.*

3. *Willful Injury.*—Where an injury is alleged to have been willfully done, it is not necessary that it should appear that the plaintiff's negligence did not contribute to it. *The Ind'lis, Pittsburgh, & Cleveland R. R. Co. v. Petty*.....261

NEW TRIAL.

See PRACTICE, 8, 23, 26, 33, 34, 38, 51, 57, 61.

1. *Motion.*—That the finding is too small, in an action upon a contract, is embraced in the fifth statutory cause for a new trial, and must be assigned in the motion therefor, in order to present the question on appeal to this court. *Frank et al. v. Kessler et ux*.....8

2. *Surprise.*—Motion by plaintiff for a new trial, on the ground of sur-

- prise, which ordinary prudence could not have guarded against. In support of the motion the plaintiff filed his own affidavit, setting forth that certain testimony of the defendant, which plaintiff had not expected, and by which he was surprised, was untrue; that he did not know of any evidence by which to contradict such testimony till after verdict, when he was informed, for the first time, of the true state of the facts and the falsity of such testimony, by a third person, whose affidavit he also filed, which set forth facts not contradictory of such testimony, but going to avoid it.
Held, that these affidavits did not show such grounds of surprise as entitled the plaintiff to a new trial. *Larrimore v. Williams*.....18
3. *Newly Discovered Evidence*.—Where the evidence given on the trial is not in the record, this court cannot say there was error in refusing to grant a new trial on the ground of newly discovered evidence, though the affidavits in support of the motion be otherwise sufficient, for it cannot know how far the alleged newly discovered evidence would be merely cumulative.....*Ibid.*
4. *As of Right*.—A new trial cannot be claimed without cause shown, under section 601 of the code, in an action to recover damages for obstructing an alleged easement..*Ibid.*
5. *Motion.—Assignment of Error*.—A motion for a new trial on the ground that "the verdict is not sustained by the evidence," does not present the question stated in an assignment of error, "that the judgment is for a larger amount than was proved by the evidence of the appellee. *Ehrman v. Kramer*.....26
6. *Admission of Evidence*.—In a suit for slander, in which there had been a change of venue, the plaintiff was permitted, over the objection of the defendant, to prove that the latter had said to the witness, that "he wanted to bring the case here on a change of venue, because he wanted H. (the plaintiff) to have some trouble as well as him all."
Held, that this was an error of law, for which the defendant was entitled to a new trial. *Peterson v. Hutchinson*.....38
7. *Withdrawal of Submission for Trial*.—Erroneously permitting the submission of a cause to the court for trial to be withdrawn, after all the evidence has been heard and before finding, is not a good cause for setting aside a trial had at a subsequent term. *Stilwell et al. v. Chappell*.....72
8. *Assignment of Error*.—Where the overruling of a motion for a new trial is not assigned as error, questions which should be included in such a motion will not be considered by this court on appeal.....*Ibid.*
9. *Excessive Damages*.—The Supreme Court will not reverse a judgment for the purpose of granting a new trial on the ground of excessive damages, where the verdict is within the range of the evidence. *Wishnier v. Behymer*.....102
10. *Admission of Evidence.—Error Cured*.—The error of admitting improper evidence over objection, is cured by the instruction of the court to the jury to disregard such evidence.....*Ibid.*
11. *Charge to Jury*.—A misstatement of the law in the charge to the jury on the trial of an indictment, which, under all the circumstances, could not prejudice the defendant, is not a good cause for a new trial. *Harris v. The State*.....131
12. *Motion.—Damages*.—A motion for a new trial assigned for cause, "error in finding any sum against the defendants and giving judgment for the plaintiff, when the judgment should have been given against the State, and in favor of the defendants, because, at most, only nominal damages could be recovered on the evidence against the defendants."
Held, that the question of the assessment of too large an amount of recovery was not presented. *McGrimes et al. v. The State*.....140
13. *New Trial after Term*.—Complaint under section 356 of the code for a new trial of a cause wherein husband and wife were plaintiffs. One paragraph of the complaint in the original proceeding counted on a cause of action belonging to the wife, for which she might have sued alone, or, as she did, jointly with her husband.
Held, that the application should have

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- been by both plaintiffs, and being so, that the complaint was insufficient for not averring that the newly discovered evidence was not fully known to the husband at the time of the previous trial, but merely alleging that the wife had since discovered it. *Berry et al. v. Daily*.....183
14. *Evidence.—Weight of.—Supreme Court.*—It is not the province of the Supreme Court to weigh the evidence and determine the preponderance thereof. Before it will interfere upon the evidence alone, it must appear by the record, not merely that the finding was against the weight of evidence, but that it was wrong beyond any question whatever. *The Ind'lis, Cincinnati, and Lafayette R. R. Co. v. Trisler*.....243
15. *Excessive Damages.*—The Supreme Court will not consider the question of excessive damages if it be not embraced in a motion for a new trial. *Ruston et al. v. Grimwood*.....364
16. *Misconduct of Jury.*—That the finding of a jury should be reached without its members being exposed to improper influences, is essential, in order to give any value to the verdict; and where, by reason of an irregularity on the part of the jury, there can be no certainty that the verdict has not been improperly influenced, there should be a new trial. *Short v. West*.....367
17. *Same.—Separation of Jury.*—Where the jury had retired to consider of their verdict, and, without the consent of the defendant or the permission of the court, about eleven o'clock at night, they agreed to return as a finding, that they agreed to disagree, and sealed up the same and disbanded (having informed the bailiff that they had agreed upon a finding and sealed it up, and the bailiff, acting in good faith, having permitted them to go to their homes); and they did not meet again until the hour of eight the next morning, when they destroyed the finding agreed upon, and brought into court a general and special verdict against the defendant;
- Held*, that a motion for a new trial by the defendant, assigning this mis-
- conduct of the jury for cause, should have been sustained.....*Ibid.*
18. *Motion.—Supreme Court.*—A party making a motion for a new trial is bound by the reasons assigned therein, as shown by the record, and can urge no others in the Supreme Court. *Gray v. Gwin*....409
19. *Motion.—Amount of Recovery.* If, in an action on a promise to pay, the motion for a new trial does not specify the first statutory cause, no question as to the amount of the verdict is presented. *Dix v. Akers et al.*.....431
20. *As of Right.*—In an action to recover real property, a new trial was granted the defendant on condition of the payment of costs in sixty days. After the sixty days, but within one year after judgment, he paid the costs and moved for a new trial. The judge having been of counsel, the motion was set down for hearing before another judge, and the order for a new trial was made after the expiration of the year.
- Held*, that the court could only make the order upon the payment of the costs, and, the costs not having been paid, the first order amounted to nothing.
- Held*, also, that the defendant, having entered his motion and paid the costs within the time fixed by law, thus secured the right to have a new trial, of which right the delay of the court could not deprive him. *Falls v. Hawthorn*.....444

NOTARY PUBLIC.

See DECEDENTS' ESTATES, 12.

NOTICE.

See MORTGAGE, 1, 11; *SHERIFF'S SALE*, 6; *VENDOR AND PURCHASER*, 21, 24, 25.

O.

OBTAINING SIGNATURE BY FALSE PRETENSES.

See CRIMINAL LAW, 16, 17.

OFFICIAL BOND.

See BOND, 1.

OFFICIAL DISCRETION.*See SHERIFF'S SALE*, 1, 2.**OPEN AND CLOSE.***See RAILROAD*, 3.**OVERSEERS OF THE POOR.***See Poor*, 2.**P.****PARENT AND CHILD.***Illegitimate children. See BASTARDY.*

Custody.—Jurisdiction.—A judgment, the effect of which is to deprive a father of the right to the custody of his infant child, without jurisdiction of the person of the father having been acquired by notice, is void.
Lee et ux. v. Back.....148

PARTIES.

See DEPOSITION, 2; GRAVEL ROAD, 7; TRUST, 9; PARTITION, 2; NEW TRIAL, 13.

1. *Joiner of.*—Under the code, in a joint action against two, as makers of a joint and several promissory note, both of whom have been duly served with process, the plaintiff, having by leave of court dismissed as to one, may proceed to judgment against the other; and such judgment, remaining in force against the latter, is no bar to a subsequent suit on the note against the former. *Maiden v. Webster*.....317
2. *Promissory Note.*—The equitable owner of a promissory note may sue upon it in his own name, and possession of the note is evidence of such ownership. *Garner v. Cook et al.*.....331
3. *Practice. — Foreclosure.*—In the foreclosure of a mortgage executed by husband and wife, the wife is a proper party defendant. *Chambers et ux. v. Nicholson*.....349
4. *Joiner. — Plaintiffs. — Demurrer.*—Where two or more plaintiffs unite in bringing a joint action, the question whether they can properly join in the suit is raised by a demurrer for the want of sufficient

facts. *Goodnight v. Goar et al.*418

5. *Same. — Code.*—The code has re-enacted the rules which had prevailed in courts of equity as to who must join as plaintiffs, and may be joined as defendants; and as to those cases in which, in equity, plaintiffs might or might not have joined, at their option, it was intended that the subject should be governed by the rules of pleading in courts of equity—each case to be decided by the courts upon authority and analogy.....*Ibid.*
6. *Same.*—Five persons subject to an impending draft for soldiers executed a written agreement to pay their proportional amount to hire substitutes to fill the places of such of them as might be drafted. Four were drafted, of whom one did not procure a substitute, avoiding military service and the necessity of procuring a substitute by failing to report himself for duty, and three hired substitutes and united as plaintiffs in an action against the others upon the agreement.

Held, that the plaintiffs could not formerly have joined in chancery, and that they could not properly join under the code.....*Ibid.*

PARTITION.*See ESTOPPEL*, 5, 6; WILL, 9.

1. *Wife's Portion.—Subsequent Marriage.*—If a widow marry, holding real estate by virtue of a previous marriage, her power to alienate such real estate is suspended during such subsequent marriage, but not the power of the court in a suit for partition to direct a sale and make such an investment of the proceeds as will secure the principal to her upon her surviving her husband, or to her children upon her death. *Finch et al. v. Jackson*.....387
2. *Defect of Parties.*—The objection to a complaint in partition that it discloses the fact that a certain portion of the lands sought to be divided is owned by the plaintiffs and defendants in common with a person whose name is not given, or any reason for not disclosing it, if a valid one, is waived if not taken by demurrer for that particular cause. *Voorhees et ux. v. Hushaw et al.*488

PARTNERSHIP.

1. *Evidence.*—Where the issue was, whether a partnership in a contract for street improvement existed between the plaintiff and defendant, as averred by the defendant, or the plaintiff was simply a surety for the defendant upon such contract, and, as such, advanced the money sued for to enable the defendant to comply with his contract, the court refused to permit the defendant to introduce in evidence a receipt for money paid on account of the work under said contract, part of which was paid by the plaintiff and part by the defendant, at the grocery of the plaintiff, on the day the receipt was dated—the plaintiff, defendant, and person to whom the money was paid being present—which receipt was drawn up at the same time by the defendant in the name of both parties, and signed by the person receiving the money, in his own handwriting, in the presence of the plaintiff and defendant.
Held, that the receipt was properly excluded. *Ehrman v. Kramer*.....26
2. *Promissory Note.*—The fact that the maker of a note, payable to a firm was one of the firm at the time of its execution, if any defense to an action thereon against the maker by one of the late firm to whom the other members except the maker have assigned their interest in the note, only goes to the amount of recovery. *Jenison v. Welsh*.....167
3. *Same.*—The action may be maintained, though there has been no final settlement of the partnership accounts, and there are outstanding credits and liabilities.....*Ibid.*
4. *Private Use of Partnership Property by one Partner.*—If one partner clandestinely uses the partnership funds or property in his own private speculation, he must account, not only for the funds or property so employed, but also for the net profits realized by the transaction. *Loue v. Carpenter et al.*.....284
5. *Evidence.—Pleading.*—Evidence that the makers of a joint and several note, purporting to be made by two, were partners at the time of its execution, and that it was given by one in the names of both, in the business of the partnership, is admissible in proof of its execution put in issue by the other maker in a suit against him on the note, though the note does not purport to be given by, or in the name of, a firm, and the complaint contains no allegation of such partnership. *Maiden v. Webster*.....317

6. *Ratification,—Pleading.—Evidence.*—Suit upon a promissory note purporting to be made by a firm. Answer by two of the firm, that the note was executed in the firm name by a third partner after dissolution of the partnership, without authority from these defendants, the other members of the firm, or either of them, the payee having full knowledge of the dissolution. Reply, that after the execution of the note said two defendants, upon a settlement of the affairs of said partnership with the payee, with full knowledge of the existence of said note, fully ratified and adopted the same as their act and deed, and paid a certain sum thereon.

Held, that ratification is a fact, and was sufficiently pleaded in the reply.

Held, also, that it was competent on the question of ratification for the plaintiff to prove the consideration of the note. *Carter et al. v. Pomeroy et al.*.....438

7. *Same.*—Where a promissory note given by one of a firm in the firm name, after dissolution of the partnership, is executed on account of a pre-existing partnership debt, and afterwards the other partners, with knowledge of this fact, adopt such note, believing it to be just, and not caring or disposed to trouble themselves as to the date or amount thereof, they are bound thereto.*Ibid.*

PART PAYMENT.

Sale of goods. See SALE, 1.

PAUPER.

See Poor.

PAYMENT.

See APPEAL, 2; JUDGMENT, 6.

1. *What Operates as.*—Where the holder of a note gives it to the ma-

- ker and takes a note held by the latter on a third person, this does not operate as a payment of the former note except by the express agreement of the creditor to take the latter note as payment, and at his own risk. *Stevens v. Anderson, Adm'r*.....391
2. *Application of.*—Where a person owes upon several distinct accounts, he has a right to direct his payments to be applied to any one of them, as he chooses; but if he pays generally, the creditor may apply as he elects; and if neither makes a specific application, then the court will usually make the application, first to the most precarious security, or to the oldest debt. *King v. Andrews, Ex'r*.....429
- PERJURY.
- Indictment.* See CRIMINAL LAW, 9, 10.
- PERPETUITY.
- See WILL, 1, 3, 4.*
- PHYSICIAN.
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- PLEADING.
- See CITY, 12; COSTS, 2; DECEDENTS' ESTATES, 19; DRAINING ASSOCIATION, 6, 8; EVIDENCE, 15; HIGHWAY, 2, 3; MALICIOUS PROSECUTION; MORTGAGE, 11; NEGLIGENCE, 3; NEW TRIAL, 13; PARTNERSHIP, 5, 6; PRACTICE, 63; RAILROAD, 5, 8, 10, 11, 12, 13, 14; TRUST, 10; VENDOR AND PURCHASER, 17, 23.*
1. *Abatement.*—Pleads in abatement must be verified by oath or affirmation. *Knafel v. Williams*.....1
2. *Temporary Bar.*—*Rebellion.*—Suit for rent, commenced October 12th, 1863. Answer, that from January 1st, 1862, till institution of action, plaintiff had been a citizen of Tennessee, and had been, during said period, and still was, actively engaged in levying war against the government of the United States, and in aiding, abetting, and upholding the late rebellion against said government, and during all said time had been an officer in the ar-
- my of the so-called Confederate States, and had not obeyed the proclamation of the President, made in pursuance of the act of Congress of July 17th, 1862. (12 Stat. at Large, 589.)
- Held*, that this answer was good in bar by force of said act of Congress.
- Held*, also, that the fact that the right of action might revive at the termination of the rebellion, is no objection to the rule that such pleas may be in bar of the action....*Ibid.*
3. *Promissory Note.—Demand.—Notice.*—In a suit against the indorser of a note payable in bank, the allegations of demand and notice of non-payment must be averments of such facts as constitute proper demand and notice. *Armstrong v. Cook*.....22
4. *Promissory Note.*—A note payable in bank, negotiated by the payee, the partner of the maker, was paid at maturity, out of partnership funds, by the payee, who charged the amount to the maker's account. On a subsequent settlement of accounts between the maker and payee, it was agreed that the latter should hold said note, unaltered, for a balance then found due him.
- Held*, in a suit by the payee against the maker, that there could be no recovery on the note, pleaded as it appeared on its face—that the complaint should have declared upon it as re-issued for a new consideration. *Koontz v. McWhinney*.....74
5. *General Denial.—Burden of Proof.*—An answer of general denial throws upon the plaintiff the burden of proving every material allegation of his complaint. *The Lafayette & Ind'lis R. R. Co. et al. v. Emanuel*.....83
6. *Answer.*—A paragraph of an answer began thus: "That at the time of said supposed wrongful taking of the property in the first count of said plaintiff's complaint mentioned, the defendant," &c.
- Held*, that this was sufficiently explicit to distinguish this paragraph as intended to apply only to the first paragraph of the complaint. *Wise v. Eastham*.....133
7. *Promissory Note.—Partnership.*—The fact that the maker of a note payable to a firm was one of the firm at the time of its execution, if

- any defense to an action thereon against the maker by one of the late firm to whom the other members except the maker have assigned their interest in the note, only goes to the amount of recovery. *Jemison v. Walsh*.....167
8. *Defective Answer*.—A paragraph of an answer which assumes to answer the whole complaint, whilst the facts pleaded only amount to an answer to a part, is bad. *The New Eel River Draining Ass'n v. Durbin*.....173
9. *Nul Tiel Corporation*.—In a suit by a draining association upon an assessment, the defendant (not being a member of the association, and not having contracted with it as a corporation) may plead *nul tiel corporation* at the date of the assessment.....*Ibid.*
10. *Excessive Assessment*.—The fact that an assessment, otherwise valid, is too high, will not defeat an action thereon, but only go to reduce the amount of recovery.....*Ibid.*
11. *Omission of Christian Name*.—The omission of the Christian name of the plaintiff in the statement of a claim against a decedent's estate is only matter in abatement, and the objection may be obviated by amendment. *Peden's Adm'r v. King et al.*.....181
12. *Answer. — Costs*.—Appeal from precepts issued on assessments for a street improvement. Answer, directed to the entire transcript, but presenting a defense to only a part of the sum for which the last precept issued.
Held, that the answer was bad on demurrer.
Held, also, that the answer should have been directed to the last estimate, and if on that issue the appellant had recovered, he would have been entitled to his costs on such issue. *Hellenkamp v. The City of Lafayette*.....192
13. *Departure*.—Suit on promissory note. Answer, alleging payment of a certain amount of illegal interest and seeking to reduce the recovery that much. Reply, that such payment was made under a subsequent written contract to pay that rate.
Held, that the reply was not a departure. *Sparks et al. v. Clapper*....204
14. *Fraud*.—It is not enough that a pleader characterize a transaction as fraudulent by the simple use of that word; he must allege such facts as show that conclusion. *Curry et al. v. Keyser*.....214
15. *Breach of Covenant*.—Where, in a suit upon a promissory note given for the purchase money of real estate, it is intended to rely in defense upon the breach of any covenant in the deed of conveyance, the original deed or a copy thereof should be filed with the answer, and such facts should be averred as constitute the breach relied on. *Starkey v. Neese*.....222
16. *Same.—Failure of Title*.—In such suit, an answer setting up a failure of title, without showing a breach of covenant, in the absence of fraud, is bad.....*Ibid.*
17. *Justice of the Peace*.—A complaint filed before a justice of the peace was a promissory note indorsed by the payee, whereby the defendant promised to pay him "one hundred & $\frac{59}{100}$."
Held, that this was sufficient as a complaint. *Griffin et al. v. Cox*.....242
18. *Set-off*.—A set-off in favor of one of two makers of a promissory note, both being principals, pleaded by him in answer to a suit on the note against the makers, is bad on demurrer.....*Ibid.*
19. *Replevin*.—Complaint in replevin before a justice of the peace in the usual form, for "one white shoat of the value of fourteen dollars."
Held, that the description of the property was sufficiently specific. *Onstatt v. Ream*.....159
20. *Complaint.—Prayer for Relief*.—The fact that one of the paragraphs of a complaint contains no prayer for relief does not render it insufficient, if the complaint contains a demand of the relief to which the plaintiff may suppose himself entitled. *Malady v. McEnary*.....273
21. *Sale of Goods*.—In a suit on a contract for the sale of goods to be delivered at a certain time and place, the complaint should show an obligation on the plaintiff to receive and pay for the goods, and aver that he was ready to pay the price according to his promise, upon the delivery of the goods as contracted. *Beard v. Sloan*.....279

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22. *Common Pleas Court.—Jurisdiction.—Title to Real Estate.*—The Common Pleas Court is not deprived of jurisdiction by reason of the title to real estate being put in issue in a cause commenced in that court, when it does not appear on the face of the complaint that such question is involved, and no subsequent pleading raising that issue is verified by affidavit. *Bourgette et al. v. Hubinger et al.*.....296
23. *Mechanic's Lien.—Insufficient Notice.*—In an action to enforce a mechanic's lien under the statute, the objection that the notice of the lien filed in the recorder's office does not contain a sufficient description of the property against which the lien is sought, is not raised by demurser to the complaint, but by motion to strike out that part of the complaint relating to the lien.....*Ibid.*
24. *Same.—Complaint.*—The question of the indebtedness and of the right to the lien are properly presented in the same paragraph of the complaint.....*Ibid.*
25. *Justice of the Peace.*—Suit by A. and B. before a justice of the peace. The complaint was a promissory note executed by the defendant to D., without indorsement. There was no express averment that the plaintiffs owned the note.
Held, that this was a sufficient complaint. *Garner v. Cook et al.*....331
26. *Proceeding Supplementary to Execution.*—In a proceeding supplementary to execution an answer or a cross-complaint not sworn to should be rejected on motion. *Routh et al. v. Spencer et al.*.....348
27. *Discontinuance.*—Suit to foreclose a mortgage. Answer, the general denial, and a paragraph professing to answer the whole complaint, alleging payment of a part of the debt secured by the mortgage. Reply of denial to this paragraph. Motion by defendant to discontinue the action because the reply had made an issue upon the defective answer.
Held, that this motion was properly overruled. *Chambers et ux. v. Nicholson.*.....249
28. *Cross-Complaint.*—Answer, in which all the material facts stated went simply in bar of the action, and the relief prayed amounted to nothing more than would be the legal effect of a judgment for the defendant.
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29. *Slander.*—An *innuendo* cannot change the ordinary meaning of language. *Ward v. Colyhan et al.*....395
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Held, that this was a power coupled with an interest, and that the surrender of bonds to the trustees to an amount equal to the valuation of the land so sold, was a substantial compliance with the terms of the power.....*Ibid.*

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25. *Appeal*.—*Unavailable Error*.—An erroneous instruction to the jury cannot, on appeal, be made available as error by a party on whose motion it was given. *Mnot et al. v. Mitchell*.....228
26. *Rejection of Evidence*.—Where the court below refuses to permit a question to be answered by a witness, the bill of exceptions must show the particular facts expected to be elicited, so that the Supreme

- Court may judge of their materiality; otherwise the error is not available. *Lewis et al. v. Lewis*.²⁵⁷
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28. *Same.—Railroads.—Injury to Animals.—Pleading*.—In a suit against a railroad company, to recover for animals killed, the complaint averred, "that the railroad aforesaid was not securely fenced in, and the fence properly maintained." *Held*, that this language may mean that the railroad was not securely fenced anywhere, and therefore imply that it was not so fenced where the animals entered upon the road; and, after verdict for the plaintiff, it is fair to assume, no objection appearing to have been made to evidence, and the evidence not being in the record, that proof of the fact thus implied was made without objection.....^{Ibid.}
29. *Withdrawal of Pleadings*.—After a new trial had been granted, the defendant asked the court for leave to withdraw his answer and demur to the complaint, which was refused. *Held*, the complaint being good, that there was no available error in this ruling. *Malady v. McEnary*....²⁷³
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Held, that in the absence of evidence of the disability of either of the parties to make the contract, it was

valid and binding between them, and C. was only bound for the performance thereof according to its terms, or for damages for a breach of it should he fail to perform it.

Held, also, that the facts that the contract was of an unusual character and that a judgment was soon afterwards rendered against B., might throw suspicion on the good faith of the transaction on the part of B., but they did not establish fraud, especially on the part of C. *Mahony et al v. Hunter's Ex'r*.....246

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1. *Fraudulent Perversion of*.—Where a note payable in bank is indorsed upon the representation of the payee that, if it be made and so indorsed, he will have it discounted at a certain bank, with which he falsely pretends to be negotiating for that purpose, and with the proceeds take up a matured note given by the same maker to the same payee, but the payee, instead of having it so discounted, retains it in his own possession, there is a want of consideration to support it against the indorser in the hands of the payee. *Armstrong v. Cook*.....22

2. *Co-Surety*.—*Contribution*.—Where a note payable in bank is indorsed with the understanding that the payee will also indorse it for the purpose of having it discounted to raise money for the benefit of the maker, there results between the indorser and payee the relation of co-sureties, with liability to contribution.....*Ibid*.

3. *Pleading*.—*Demand*.—*Notice*.—In a suit against the indorser of a note payable in bank, the allegations of demand and notice of non-payment must be averments of such facts as constitute proper demand and notice.....*Ibid*.

4. *Pleading*.—A note payable in bank, negotiated by the payee, the partner of the maker, was paid at maturity, out of partnership funds, by the payee, who charged the amount to the maker's account. On a subsequent settlement of accounts between the maker and payee, it was agreed that the latter should hold said note, unaltered, for a balance then found due him.

Held, in a suit by the payee against the maker, that there could be no recovery on the note, pleaded as it appeared on its face—that the complaint should have declared upon it

- as re-issued for a new consideration.
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5. *Full Indorsement.—Alteration of.*
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6. *Spoliation of Written Instrument.*
 The spoliation of an instrument by a stranger, without the knowledge or consent of the parties in interest, cannot change the rights or liabilities of those parties.....*Ibid.*
7. *Partnership*—The fact that the maker of a note payable to a firm was one of the firm at the time of its execution, if any defense to an action thereon against the maker by one of the late firm to whom the other members except the maker have assigned their interest in the note, only goes to the amount of recovery. *Jenison v. Walsh*....167
8. *Same*.—The action may be maintained, though there has been no final settlement of partnership accounts, and there are outstanding credits and liabilities.....*Ibid.*
9. *Extension of Time*.—Suit on a note payable one day after date. Answer, setting out a written agreement by the parties, made three days after the execution of the note, that in consideration of a sale then made of a stock of goods, to the maker, he should first pay two other notes executed at the date of said agreement to the same payee, due six and twelve months after date, the same to be paid off with the proceeds of said goods, and that after they were so paid, the note in suit should be paid.
Held, that this agreement did not extend the time at which the notes last executed became due, but did extend the time for the payment of the note in suit one year from the date of said agreement.....*Ibid.*
10. *Surety*.—The material alteration of a promissory note after its execution, without the knowledge or consent of the surety, by adding a clause fixing the rate of interest, constitutes a good defense to a suit on the note so altered, against the surety. *Hart v. Clouser*.....210
11. *Joint and Several*.—A promissory note commencing, "I agree to pay," &c., and signed by two, is joint and several, and the holder may, at his election, sue one or both of the makers. *Maiden v. Webster*.....317
12. *Parties.—Joiner of.*—Under the code, in a joint action against two, as makers of a joint and several promissory note, both of whom have been duly served with process, the plaintiff, having by leave of court dismissed as to one, may proceed to judgment against the other; and such judgment, remaining in force against the latter, is no bar to a subsequent suit on the note against the former.....*Ibid.*
13. *Partnership.—Evidence.—Pleading.*
 Evidence that the makers of a joint and several note, purporting to be made by two, were partners at the time of its execution, and that it was given by one in the names of both, in the business of the partnership, is admissible in proof of its execution put in issue by the other maker in a suit against him on the note, though the note does not purport to be given by, or in the name of, a firm, and the complaint contains no allegation of such partnership.....*Ibid.*
14. *Parties.—Evidence*.—The equitable owner of a promissory note may sue upon it in his own name, and possession of the note is evidence of such ownership. *Garner v. Cook et al.*.....331
15. *Justice of the Peace.—Pleading.*—Suit by A. and B. before a justice of the peace: the complaint was a promissory note executed by the defendant, C., to D., without indorsement. There was no express averment that the plaintiffs owned the note.
Held, that this was a sufficient complaint.....*Ibid.*
16. *Diligence*.—In order to bind the assignor of a promissory note, such diligence only is required of the assignee in prosecuting the maker to insolvency as prudent men usually exercise in taking care of their own interests under like circumstances. *Miller v. Deaver*.....371
17. *Same*.—Where the assignee commenced his suit on the note against the maker in proper time, in the court first to sit after the maturity of the note, and the legislature, after

- the suit was brought, postponed the term of the court in which it was pending until after the sitting of another court;
Held, that the assignee was not bound to dismiss the suit and commence in the other court.....*Ibid.*
18. *Same*.—A judgment having been obtained in proper time by the assignee against the maker, execution was issued thereon twenty-three days after its rendition and twelve days after the close of the term.
Held, that, *prima facie*, this was due diligence.....*Ibid.*
19. *Same*.—*Excuse for Want of Diligence*.—The insolvency of the maker when judgment is rendered against him at the suit of an assignee, excuses the necessity of an execution.....*Ibid.*
20. *Same*.—*Evidence*.—Where, in a suit by the assignee against the assignor of a promissory note, the plaintiff put in evidence a judgment recovered by him against the maker and a summons showing the commencement of the suit which resulted in the judgment, but omitted to introduce any other part of the record;
Held, that as it did not appear that the judgment introduced was upon the note in suit, this evidence was insufficient to bind the assignor. *Ibid.*
21. *Payment*.—*What Operates as*.—Where the holder of a note gives it to the maker and takes a note held by the latter on a third person, this does not operate as a payment of the former note except by the express agreement of the creditor to take the latter note as payment, and at his own risk. *Stevens v. Anderson, Adm'r*.....391
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2. *Trial by Jury*.—*Constitutional Law*.—*Assessment of Damages*.—Upon an appeal to the Circuit Court from a proceeding before a justice of the peace to assess damages sustained by the owner of land taken for public use under the ninth section of the act to incorporate the Evansville and Illinois Railroad Company (Local Laws 1849), the Circuit Court, sitting as a court of chancery, may take the opinion of a jury upon a single question of fact, but in such cases trial by jury is not a constitutional right. *The Evansville & Crawfordsville R. R. Co. v. Miller*.....209
3. *Same*.—*Practice*.—*Burden of the Issue*.—The only question presented in the Circuit Court on an appeal by the owner of the land condemned being the measure of damages; *held*, that the appellant had the right to begin.....*Ibid.*
4. *Same*.—*Judgment*.—In such case it is error to render a common judgment against the corporation for the damages, without a decree for the conveyance of the land in question to the corporation upon the payment of the money.*Ibid.*
5. *Injury to Animals*.—*Pleading*.—In a suit against a railroad company, to recover for animals killed, the complaint averred, "that the railroad aforesaid was not securely fenced in, and the fence properly maintained."
Held, that this language may mean that the railroad was not securely fenced anywhere, and therefore imply that it was not so fenced where

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- the animals entered upon the road; and, after verdict for the plaintiff, it is fair to assume, no objection appearing to have been made to evidence, and the evidence not being in the record, that proof of the fact thus implied was made without objection. *The Ind'lis, Pittsburgh, & Cleveland R. R. Co. v. Petty*.....261
6. *Damages*.—If a railroad company in constructing its road make a ditch along the side thereof so as to carry off the water from the adjoining land to a natural channel, it is not bound to keep such ditch open, if the flow of the water is not changed injuriously to the owner of the land by the building of the road. *The Louisville, New Albany, & Chicago R. R. Co. v. McAfee*.....291
7. *Injury to Animals.—Fences*.—The object of the statute providing compensation for animals killed or injured by the cars, &c., of railroad companies is the protection of the public, and not simply to compensate the owners of the animals; and the fact that the owner of the land has for a long period, without any contract to that effect, maintained a sufficient fence, does not, so far as the public is concerned, relieve the company from the duty imposed by the statute. While the fence is so maintained the company is not liable to the penalty provided by law, but that penalty is incurred whenever the failure to maintain the fence as required may happen. *The Jeffersonville, Madison, & Ind'lis R. R. Co. v. Nichols*.....321
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9. *Same.—Statute Construed*.—The act to provide compensation to the owners of animals killed or injured by the cars, &c. (Acts 1863, p. 25), does not apply when the killing or injury occurs at a point at which the road cannot be legally fenced in. *The Jeffersonville, Madison, & Indianapolis R. R. Co. v. Brevoort*.....324
10. *Same.—Pleading*.—The fact that the company is not bound to fence at the place where the killing or in- jury occurs is purely a matter of defense, and need not be negatived in the complaint.....*Ibid.*
11. *Same.—Pleading.—Evidence*.—Animals killed or injured at different times constitute separate and distinct causes of action, each of which should be stated in a separate paragraph of the complaint; and where the complaint indicates but one cause of action, the plaintiff should be confined, in his evidence, to a single transaction.....*Ibid.*
12. *Same.—Jurisdiction*.—Two or more causes of action cannot be united in the same suit for the purpose of giving the Circuit or Common Pleas Court jurisdiction, which is wanting when the value of the animal or animals killed, or the injury done, at the same time, does not exceed fifty dollars.....*Ibid.*
13. *Same.—Pleading*.—Suit against a railroad company for the value of stock killed on the track of the defendant by a passing train, the complaint averring, "that at the time and place when and where said stock was so run over and killed as aforesaid, the said railroad was not securely fenced as required by law." Held, that this averment sufficiently implied that the road was not securely fenced where the animals entered upon it. Held, also, that the words, "not securely fenced as required by law," alleged a fact, and not a conclusion of law. *The Jeff., Mad., & Ind'lis R. R. Co. v. Chenoweth*.....366
14. *Same.—Pleading.—Justice of the Peace*.—Complaint before a justice of the peace against a railroad company, averring that a "locomotive owned and used by the said defendant on its railroad in the county of Franklin and State of Indiana, on, &c., struck, ran against and over, and killed, one hog of the plaintiff;" and that at the time and place of the killing the road was not fenced. Held, that by the liberality of construction which pleadings before a justice of the peace should receive, this sufficiently showed that the animal was killed in Franklin county, and that the defendant committed the injury. Held, also, that an allegation that the road could properly have been

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5. *Appeal.*—A pleading having been once copied into the record made out on appeal, it is not necessary to copy it again when introduced into subsequent parts of the record; a reference to it by which it can be identified being all that is necessary. *Voorhees et ux. v. Hushaw et al.*...488
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2. *Same.*—*Official Discretion.*—*Fraud.* Where there is no actual division of the property, and the question of its susceptibility of division must be determined by the sheriff; if there may be an honest difference of opinion, the conclusion reached by the officer must be final—unless his action operate as a fraud upon the execution defendant or his creditors, it cannot be reviewed.....*Ibid.*
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- Held*, that by the act of March 4th, 1853 (Acts 1853, p. 55), the petitioners were entitled to one undivided half of such land, but that sections 1, 2, 3, and 4 of said act, not being in conformity with the ruling in *Langdon v. Applegate*, 5 Ind. 327, were repealed by the act of March 9th, 1867 (Acts 1867, p. 204), leaving in force the provision of the act of May 14th, 1852 (1 G. & H. 298, sec. 26), that in such case the widow is entitled to the entire estate—the commencement of actions arising under the law repealed being limited to ninety days from the passage of said act of 1867, which to the petitioners was a reasonable time. *Leard et al. v. Leard*.....171
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9. *Draining Association*.—A draining association, organized under the act of June 12th, 1852, is not a corporation until the articles of association have been in fact recorded in the recorder's office of the county or counties in which the contemplated work is situated. *The New Eel River Draining Ass'n v. Durbin*.....173
10. *Common Schools*.—*Special Revenue*.—School trustees, in anticipation of the actual collection of funds levied under the act of March 9th, 1867 (Acts 1867, p. 30), may employ teachers to carry on schools within the year for which the levy has been made, to be paid out of such funds when collected. *Harney v. Wooden et al.*.....178
11. *Same*.—*School Revenue for Tuition*.—The only portion of the school fund which the school trustees may not expend in anticipation is the school revenue for tuition belonging to the State, and by it apportioned.....*Ibid.*
12. *Liquor Law*.—The ninth section of the liquor law of 1859 (1 G. & H. 616) applies to unlicensed as well as licensed retailers. *Fitznerider v. The State*.....238
13. *Draining Association*.—*Affidavit of Appraisers*.—An affidavit that "the foregoing appraisement is cor-
- rect to the best of our judgment" is sufficient under section 12, 1 G. & H. 304, requiring an affidavit "that the same is in all respects a true assessment to the best of their judgment and belief." *Large v. The Keen's Creek Draining Co.*.....263
14. *Resulting Trust*.—If a husband fraudulently take a conveyance of real estate in his own name, the consideration having been paid by his wife, a trust thereby results in favor of the latter. The statute (1 G. & H. 651, secs. 6, 8), does not change this rule of equity. *Maldy v. McElroy*.....273
15. *Practice*.—*Appeal*.—*Reserved Question of Law*.—If it is expected to reverse a judgment upon a question of law reserved for the decision of the Supreme Court, under section 347 of the code, such question must generally be so presented below that the lower court, by doing what the complaining party moves it to do, can cure or avoid the error complained of. *Love v. Carpenter et al.*.....284
16. *Decedents' Estates*.—*Claims*.—All claims against decedents' estates not excepted by section 62, 2 G. & H. 501, if not filed as required by that section, are barred, except as provided by section 178 of the same act. *Ratcliff v. Leunig et al.*.....289
17. *Words and Phrases*.—The definitions of words and phrases in section 797 of the code are applied only in the construction of statutes, and not of wills or private instruments. *Cate v. Cranor, Executor, et al.*.....292
18. *Conveyance to Husband and Wife*.—*Common Law*.—At common law, if a conveyance of real estate is made to a man and his wife, they are not joint tenants or tenants in common, but both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor. *Arnold et al. v. Arnold*.....305
19. *Same*.—*Statute*.—Such was the law under the act of January 2d, 1818 (Rev. Stat. 1838, 398), and such is the law under the statutes of 1852 (1 G. & H. 259, secs. 7, 8).....*Ibid.*
20. *Railroads*.—*Injury to Animals*.—*Fences*.—The object of the statute

providing compensation for animals killed or injured by the cars, &c., of railroad companies is the protection of the public, and not simply to compensate the owners of the animals; and the fact that the owner of the land has for a long period, without any contract to that effect, maintained a sufficient fence, does not, so far as the public is concerned, relieve the company from the duty imposed by the statute. While the fence is so maintained the company is not liable to the penalty provided by law, but that penalty is incurred whenever the failure to maintain the fence as required may happen. *The Jeff., Mad., and Ind., R. R. Co. v. Nichols*.....321
 21. *Same*.—The act to provide compensation to the owners of animals killed or injured by the cars, &c. (Acts 1863, p. 25), does not apply when the killing or injury occurs at a point at which the road cannot be legally fenced in. *The Jeff., Mad., and Ind., R. R. Co. v. Brevoort*.....324

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Service of process on. *See PROCESS*, 1.

1. *Common Labor*.—*Contract*.—Where persons enter into a contract to be performed on Sunday by common labor, such contract, as to its performance on Sunday, is illegal and void. *Pate v. Wright et al.*.....476
2. *Same*.—*Work of Necessity*.—The delivery of a quantity of flour on board a steamboat on Sunday in order to avoid the liability of delay in getting it to market occasioned

by danger of the closing of navigation, is not a work of necessity. *Ibid.*

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See HIGHWAY, 2.

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2. *Murder*.—*Habeas Corpus*.—*Bail Appeal*.—On appeal from the refusal of a judge to admit to bail a prisoner committed on a charge of murder, the Supreme Court will weigh the evidence and determine the facts, as if trying the case originally. *Ex parte Moore*.....197

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See CONSTITUTIONAL LAW, 2.

1. *Tax Duplicate*.—*Authority of City Treasurer*.—The tax duplicate and the warrant attached thereto, provided for by section 23 of the act for the incorporation of cities (Acts 1867, p. 41), constitute the city treasurer's authority for enforcing the payment of taxes by seizure and sale of property, and, taken together, confer on him the same power to seize and sell personal property as is conferred by an execution upon a sheriff; but the duplicate, unaccompanied by the war-

rant, is not sufficient. *Wise v. Eastham*.....133
 2. *Same.—Alteration of Assessment.*—The city treasurer has power to assess persons whom the assessor has failed to list, but has no authority to alter upon the tax duplicate an assessment made by the assessor, or to add to such assessment by the assessor property omitted therein belonging to the person assessed. *Ibid.*

TENANT.

By courtesy. See VENDOR AND PURCHASER, 18.
In common. See WASTE, 1.
From year to year. See LANDLORD AND TENANT.

TENDER.

Of deed. See CONTRACT, 13.

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See BILL OF EXCEPTIONS, 1; CRIMINAL LAW, 10, 12; PRACTICE, 8; PRINCIPAL AND SURETY, 4; PROMISSORY NOTE, 9.

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See CONSTITUTIONAL LAW, 6.

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See TRUST, 9.

TOWNSHIP TRUSTEE.

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See PRACTICE, 58; RECORD.

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Of city. See CITY, 1, 2.

TREATY.

Indian Reservation.—Ultimate Title.—A reservation of land in an Indian

treaty of cession simply secures to those in whose favor the reservation is made a continuation of the right of occupancy in the land reserved, while the ultimate title remains in the United States, as before the treaty. *Wheeler et al. v. Me-shing-go-me-sia*.....402

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TRESPASS.

See CITY, 11; GRAVEL ROAD, 1, 2; HIGHWAY, 2.

1. *Criminal Law.—Indictment.—Trespass on Land.*—An indictment charged that the defendant, "on, &c., at, &c., did unlawfully cut down and remove, on and from land belonging to M. S., in said county, one tree of the value of fifty cents, the property of M. S., without having license so to do from said M. S., or any other competent authority."

Held, that this was a sufficiently certain description of the land upon which the trespass was committed. *Newland v. The State*.....111

2. *Same.—*An indictment charging the defendant with cutting, sawing, and removing from the land of another, without license, a certain quantity of ice of the value of ten dollars, the property of the owner of the land, it not appearing therefrom whether the ice was taken from a running stream or from a natural or artificial pond, was held good.

Quicry, as to what evidence would justify a conviction. *The State v. Pottmeyer*.....287

3. *Pleading.—Justification.*—An answer setting up matter in justification of acts therein mentioned, but not indicating the acts justified as the acts complained of, is bad on demurrer, but may be good as an affidavit against a temporary restraining order. *Wheeler et al. v. Me-shing-go-me-sia*.....403

4. *License.*—One in whom is vested the legal title in fee in trust for himself and others cannot maintain trespass against a person whom he

, has himself licensed to do the acts complained of.....*Ibid.*

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1. *Resulting Trust.—Evidence.*—Parrol evidence to establish a resulting trust in land held by an absolute conveyance, after a long lapse of time and the death of the nominal purchaser, must be strong and clearly relevant. *Collier et al. v. Collier et al.*.....32

2. *Sheriff's Sale.*—A person cannot be treated as a trustee, who, without fraud, purchases real estate at a sheriff's sale with his own money, and takes the title in his own name, upon a verbal agreement to hold it for the benefit of the execution debtor. *Minot et al. v. Mitchell.*228

3. *Resulting Trust.—Statute.*—If a husband fraudulently take a conveyance of real estate in his own name, the consideration having been paid by his wife, a trust thereby results in favor of the latter. The statute (1 G. & H. 651, secs. 6, 8) does not change this rule of equity. *Malady v. McEnary*.....273

4. *Same.—Suit by Heir.—Witness.—Competency of.*—In a suit by an heir to enforce an implied trust in real estate, growing out of the taking of the title by the defendant in his own name, the purchase money having been paid by the plaintiff's ancestor, the defendant is not a competent witness for himself as to any matter occurring prior to the death of such ancestor.....*Ibid.*

5. *Same.—Instructions to Jury.*—In such a suit the court, while instructing the jury, was asked by the defendant to instruct, that "verbal testimony, to be sufficient to establish a resulting trust in a case like this, ought to be clear and strong." The instruction was not given as asked, but as follows: "A deed is a solemn instrument, and evidence to vary the effect expressed in it, and establish a resulting trust, must prove necessary facts by a clear preponderance."

Held, that there was no error in this.....*Ibid.*

6. *Will.—Bequest by J.,* "that my son S. shall receive of my estate the sum of \$200, to be paid him at the death of my wife, provided my wife shall outlive me; which said \$200 it is my wish my son S. shall add to the advancement he may make to his son R., when R. comes of age."

Held, that the bequest created a trust in favor of R., and that the legacy, received by S., on the death of J.'s wife, from the executor of J., was to go to R., on his arriving at majority, whether his father made any advancement to him or not. *Reed's Adm'r v. Reed*.....313

7. *Trespass.—License.*—One in whom is vested the legal title in fee in trust for himself and others cannot maintain trespass against a person whom he has himself licensed to do the acts complained of. *Wheeler et al. v. Me-shing-go-me-sia*.....402

8. *Express Trust.—Lost Writing.—Evidence.*—At a regularly organized public meeting of the citizens of a township, called and held to raise money, volunteers, and substitutes, for the purpose of relieving the township of an impending draft for soldiers, various citizens agreed, each for himself, to pay divers sums for such purpose, and among them A., who was subject to the draft, promised to pay a certain sum on condition the township should be so relieved; if not, the money to be refunded. By the aid of the money so raised and promises so made, or by such money, promises, and otherwise, the township was relieved. Certain citizens were appointed by the meeting, to collect and receipt for the money so paid and promised, and to apply the same so as to effect the release of the township; and they collected the several amounts and so applied them, to the satisfaction of the promisors, including A., except the sum promised by A., who refused to pay on their demand.

Held, that the persons so appointed were trustees of an express trust, and entitled to sue on the promise of A.

Held, also, that the minutes of the

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meeting being lost, it was proper to introduce parol evidence of their contents; and the memorandum kept by the clerk of the meeting, of the names and the amounts pledged, was only a part of the minutes. *Dix v. Akers et al.*.....431

9. *Parties.—Contracts.—Statute of Frauds.*—Suit for a breach of duty by defendants as trustees, in surrendering and allowing to be canceled certain bonds executed by a railroad company, and held by defendants in trust to secure the repayment of certain sums advanced to the company by a town, the plaintiff's assignor.

Held, that the railroad company was not a necessary party defendant.

Held, also, the contract by the town with the company not being prohibited by any statute, that the mere lack of power in the town to loan money could not be taken advantage of by the borrower or by the defendants.

Held, also, that an acceptance of the trust in writing by the trustees was not necessary to fix their liability. *Ridenour et al. v. Wherritt*.....485

10. *Damages.—Pleading.*—The complaint showed that the company was in default by a violation of its agreement to apply the net earnings of the road to the liquidation of the debt assigned to the plaintiff, and that the plaintiff was injured by the wrongful act of the defendants in a certain amount.

Held, that the complaint was not defective for not alleging that the debt from the railroad company was due, and a failure to pay.....*Ibid.*

TURNPIKE.

See ASSESSMENT FOR LOCAL IMPROVEMENT; GRAVEL ROAD.

U.

ULTIMATE TITLE.

See TREATY.

UNITED STATES COURTS.

See CONFISCATION, 1, 2.

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VENDOR AND PURCHASER.

See FRAUDS, STATUTE OF, 1, 2; MORTGAGE, 11; SHERIFF'S SALE; TRUST. Vendor's Lien. See JUDGMENT, 5; JURISDICTION, 1.

1. *Consideration.—Covenant.*—A. and B. sold, and by deed with full covenants, conveyed, to C. certain real estate, A. having only a life estate therein, and B. only one undivided half in fee, subject to such life estate.

Held, in a suit against C., in possession under the deed, on his note given for a part of the purchase money, that this partial want of title in the vendors was no failure of the consideration of the note, or breach of the covenants in the deed entitling C. to recover back any part of the purchase money. *Stephens et al. v. Evans' Adm'z*.....39

2. *Incumbrance.—Recoupment.*—In a suit by the assignee against the maker of a promissory note given as the last payment on certain real estate conveyed by warranty deed, the purchaser, who had paid all the consideration money except the note in suit, was properly allowed to recoup an amount which he had been compelled to pay to discharge an incumbrance not excepted from the warranty, being a note secured by mortgage on said real estate, other notes secured by the same mortgage being so excepted in the deed. *Stilwell et al. v. Chappell*.....72

3. *Covenant of Warranty.—Incumbrance.—Evidence.*—Where, at the time of the conveyance of land by warranty deed in exchange for other land, it is agreed by the parties that the taxes due upon the lands so mutually exchanged shall be set

- off against each other, the taxes on the land so conveyed by warranty deed are part of the consideration for such deed, and in an action against the vendor, by the vendee, or one deriving title by warranty deed from the vendee, to recover money paid by the plaintiff to remove the incumbrance of the taxes so assumed by the vendee, parol proof of such contract concerning the taxes is admissible. *Robinius v. Lister et al.*.....142
4. *Same.—Satisfaction of Breach.*—If it be considered in such case that the warranty of the vendor is broken, still the vendee can thus agree upon the damages, and payment by the vendor, before action brought, of the taxes due on the land received by him in exchange will satisfy the breach.....*Ibid.*
5. *Trusts and Powers.*—A railroad company conveyed by deed forty-four tracts of land, each numbered, described, and valued, to trustees, to secure the payment of bonds, issued by the former, and put upon the market to raise money, reserving the power to sell any portion of the land at its valuation; and, upon the surrender by the company to the trustees of bonds equal in amount to the land sold, the latter were empowered to convey in fee. *Held*, that this was a power coupled with an interest, and required only a substantial compliance with its terms. *Rowe et al. v. Beckett et al.*.....154
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7. *Conveyance.*—A deed, in which the grantor uses the words "release, remise, and forever quit claim," passes the fee to the alienee....*Ibid.*
8. *Adverse Possession.*—The possession of the grantor is not adverse to the title of his grantee.....*Ibid.*
9. *Champerty.*—The conveyance of land, pending a suit to set aside a deed therefor, if made to one not having any connection with the action, or knowledge of it, is not void for champerty.....*Ibid.*
10. *Trusts and Powers.*—A deed conveying real estate to trustees to secure the payment of bonds of the grantor, put in circulation for the purpose of borrowing money, vests the legal title in the trustees, and a power to convey contained in such deed is coupled with an interest. *Rowe et al. v. Lewis et al.*.....163
11. *Same.*—In such case the law requires only a substantial compliance with the terms of the power.....*Ibid.*
12. *Same.*—A railroad company conveyed forty-four tracts of land, each numbered, described, and valued, to trustees, to secure the payment of bonds, amounting, in the aggregate, to seventy-five thousand dollars, put upon the market to raise money, reserving the right in the company to sell any portion of the land at the valuation thereof; and upon the surrender to the trustees of bonds to the amount of the land sold by the company, the former were empowered to convey the land in fee. *Held*, that this was a power coupled with an interest, and that the surrender of bonds to the trustees to an amount equal to the valuation of the land so sold, was a substantial compliance with the terms of the power.....*Ibid.*
13. *Pleading.—Breach of Covenant.*—Where, in a suit upon a promissory note given for the purchase money of real estate, it is intended to rely in defense upon the breach of any covenant in the deed of conveyance, the original deed or a copy thereof should be filed with the answer, and such facts should be averred as constitute the breach relied on. *Starkey v. Neese*.....222
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15. *Contract.—Consideration.*—A purchased certain real estate from B., the legal title being in C., to whom there was a balance of purchase money due from B., for which A. gave his note to C. and took from him the deed. *Held*, that, as between A. and C., the consideration of the note was the indebtedness of B. to C.....*Ibid.*
16. *Vendor's Lien.—Assignment of.—Married Woman.*—It is well settled in

- this State, that the assignment of a note given to secure the purchase money of real estate carries with it the vendor's lien on the property; and it makes no difference that the payor is a married woman at the time of the execution of the note. *Perry et al. v. Roberts*.....244
17. *Same.*—*Coverture.*—Coverture is no bar to a suit to enforce a vendor's lien on real estate for unpaid purchase money.....*Ibid.*
18. *Heirs.*—*Covenant of Ancestor.*—A tenant by courtesy sold, and by warranty deed conveyed, the land in which he had such estate. *Held*, that after his death the heirs at law, to whom such real estate descended in fee from the wife, were entitled to the possession thereof, though they were children and heirs at law of the husband and had received from him, by descent, an estate of much greater value than the land so conveyed. *Hartman v. Lee et al.*.....281
19. *Same.*—*Decedents' Estates.*—After the death of the grantor in a deed of conveyance of real estate, a claim for damages upon the breach of a covenant of warranty therein must be filed against his estate as provided in section 62, 2 G. & H. 501; and if not so filed is liable to become barred.....*Ibid.*
20. *Liability of Heirs.*—The only statutory provisions making the heirs and devisees liable in such cases after settlement of the decedent's estate, seem to be those commencing with section 178, 2 G & H. 534.....*Ibid.*
21. *Guardian's Sale of Real Estate.*—*Fraud.*—A guardian, for the purpose of obtaining to himself the title to the real estate of his ward, procured an order of sale, and sold the land at public sale, but made report that he had sold at private sale as ordered by the court. He procured a person to bid off the land for his benefit and discouraged and prevented others from bidding. The purchaser assigned to the guardian the certificate of purchase given him by the guardian, and received back his notes for the deferred payments, the first payment not having been made, though the guardian had reported full payment. The commissioner appointed to make convey-
- ance executed a deed to the guardian as assignee of the purchaser. The proceedings as they appeared upon the record were regular and valid. *Held*, that, as between the guardian and ward, the title of the former was bad, but not so the title of a purchaser from the guardian for a valuable consideration and without notice of the fraud, or the title of the vendee of such a purchaser. *Gwynn et ux. v. Williams et al.*....374
22. *Title Bond.*—*Measure of Damages.*—*Rescission.*—Suit on a title bond for the conveyance of certain land, "with the house, steam-saw-mill, and all the privileges, appurtenances, and machinery of every kind to the same belonging." Complaint averred that the purchase money had been paid in money, land, and property which the defendant had agreed to receive and had received in payment; that plaintiff purchased with the express view of getting the steam-saw-mill, believing the same to be situated on the land, which defendant knew; but that the mill was in fact situated on land to which defendant had no title; that certain appurtenances to the mill, without which it would be of little or no value, as well as part of the mill itself, were situated on a strip of land to which the defendant had no title and no right of control; that defendant had failed to make a deed for the mill and appurtenances, and could not do so. Prayer, that the bond be canceled, but for judgment for the amount of the penalty. *Held*, that the complaint was sufficient to entitle the plaintiff to damages, but not to authorize a rescission. *Held*, also, that the prayer for rescission did not make the complaint bad. *Held*, also, that the measure of damages in such case is the purchase money and interest. *Held*, also, that the acceptance of property in accord and satisfaction bound the defendant to the fulfillment of his contract the same as if payment had been made in money. *Adamson v. Rose*.....380
23. *Vendor's Lien.*—*Pleading.*—Suit by A. against B. on a promissory note. Answer, that the note was executed in part payment for cer-

- tain land sold and conveyed by deed with full covenants by A. to B.; that A. had purchased the land of C., giving in part payment his two notes, which were due and unpaid; that before commencement of this action C. had notified B. that he held a vendor's lien on the land, which he intended to enforce; that C. had sued and obtained judgment on one of said two notes, and an execution issued on the judgment had been returned *nulla bona*; that at the time of conveyance by A. to B., the latter was ignorant of C.'s lien, the existence of which A. falsely and fraudulently concealed; that A. had sold all his real estate, had left the State, and was not a resident thereof; that defendant was informed and believed that plaintiff was wholly insolvent; that he had not left sufficient property within the jurisdiction of the court to satisfy any judgment which C. had obtained or might obtain against him, or any part thereof; that A. was not fully able to respond in damages to B. for any breach of the covenants in his deed; that B. was, and always had been, willing to pay the note in suit, and then paid the money into court. Prayer, that before the money should be paid over, B. might be indemnified, &c. Judgment against B., and the clerk enjoined from paying the money to A. until, &c.
- Held*, that the answer was sufficient to entitle the defendant to the relief awarded him, independent of the averment on information and belief of the plaintiff's insolvency.
- Held*, also, that it was not necessary to set out, as part of the answer, a copy of C.'s judgment, or of the notes executed by A. to C.
- Held*, also, that C. had a right to pursue his remedy on the notes without waiving his lien. *Crowfoot v. Zink*.....446
24. *Incumbrances.—Notice*.—Notice to the purchaser of real estate at the time of purchase that his vendor owes any part of the purchase money, is sufficient to put such purchaser upon inquiry as to the amount unpaid and the condition thereof as to security. *Wilson v. Hunter et al.*.....466
25. *Same*.—A. sold and conveyed certain real estate to B., and took his notes for the purchase money, and a mortgage on the land to secure the same. Before the mortgage was recorded, but after the time limited therefor, B., still owing the entire purchase money, sold and conveyed the land to C., who at the time of his purchase had notice that there was due from B. to A. unpaid purchase money to a certain amount, being only a part of the actual amount, but had no notice of the mortgage.
- Held*, that C. could not be considered a purchaser in good faith without notice of the mortgage.
- Query*.—Where a purchaser, who has taken a conveyance and paid part of the purchase money in good faith, receives actual notice, before all the purchase money has been paid, of such a prior outstanding unrecorded mortgage, does the land thereby become chargeable in his hands for the whole amount due on the mortgage? And is there a distinction in this respect between a prior mortgage or other mere money incumbrance, and a prior legal or equitable title to the estate itself?
- Query*.—Does the vendor of real estate, by taking a mortgage thereon to secure unpaid purchase money, waive his implied equitable lien? *Ibid.*
26. *Estoppe*.—*Heirs.—Consideration*. A., the owner of certain real estate, voluntarily refused to pay the taxes thereon, and designedly permitted it to be returned as delinquent and to be sold for taxes, and procured B. to buy it in at such sale and to assign the certificate of purchase to the daughter of A., and procured the county auditor to convey the land to said daughter, under the certificate, with intent, in consideration of natural love and affection, to thereby invest her with the title to the land as a voluntary and absolute gift, and not as an advancement.
- Held*, in a suit, after A.'s death, against said daughter by the other heirs at law of A., for partition of

said land, that these facts did not estop the plaintiffs from denying the validity of the sale for taxes or the title of the daughter under it. *Voorhees et ux. v. Ilushaw et al.* 488

VENUE.

See APPEAL, 1.

VERDICT.

See PRACTICE, 27, 28; REPLEVIN.

1. *Special Finding*.—*Interrogatories*.

An interrogatory propounded to a jury for the purpose of obtaining a special finding upon a particular question of fact, which presents alternative and antagonistic propositions, in such form that an affirmative answer to one excludes the truth of the other, is not double, so as to require a separate answer to each branch of it. *Noakes et al. v. Morcy et al.* 103

2. *Defective Special Finding*.—If a special finding be equivocal, or not fully responsive to the interrogatory, either party may demand that the verdict be not received, and that the jury be kept together and directed to answer fully; but after the verdict has been received without objection, and the jury discharged, it is error to strike from the record such special finding, pertinent to the case, and render judgment on the residue of the finding. *Ibid.*

3. *Special Finding*.—That the special finding of facts is inconsistent with the general verdict, is not a cause for a new trial; but the proper motion is for judgment on the special finding, notwithstanding the general verdict. *Adamson v. Rose*..... 380

W.

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WAR.

1. *War Power*.—The law of nations

imposes the only limit on the war power of the United States, and there is no difference in this respect between a foreign and a civil war. *Knafel v. Williams*..... 1

2. *Temporary Bar*.—*Rebellion*.—Suit for rent, commenced October 12th, 1863. Answer, that from January 1st, 1862, till institution of action, plaintiff had been a citizen of Tennessee, and had been, during said period, and still was, actively engaged in levying war against the government of the United States, and in aiding, abetting, and upholding the late rebellion against said government, and during all said time had been an officer in the army of the so-called Confederate States, and had not obeyed the proclamation of the President, made in pursuance of the act of Congress of July 17th, 1862. (12 Stat. at Large, 589.)

Held, that this answer was good in bar by force of said act of Congress.

Held, also, that the fact that the right of action might revive at the termination of the rebellion, is no objection to the rule that such plea may be in bar of the action.... *Ibid.*

WARRANTY.

Covenant of. *See VENDOR AND PURCHASER*, 3, 4, 18, 19, 20.

WASTE.

1. *Tenant in Common*.—One tenant in common may be liable to his co-tenant for waste. *Wheeler et al. v. Me-shing-go-me-sia*..... 402

2. *Pleading*.—An averment in a complaint, that the trees cut, "as a part of the inheritance to which they attached, are not capable of being valued," is not an allegation that the land has been diminished in value as an inheritance.... *Ibid.*

3. *Common Law*.—The common law doctrine, that the cutting of standing trees is waste, does not apply to the members of a band of Indians in the use of a large tract of wild land in this State granted to them by the United States..... *Ibid.*

WAY.

See DEDICATION, 1; DRAINING ASSOCIATION, 9; GRAVEL ROAD, 1, 2.

WIDOW.

See Cases Overruled, &c., 8; Descent, 1, 3.

Widow's Distributive Share.—A widow's share in the personal property left for distribution on the settlement of the estate of her deceased husband is the same whether she be the widow of a first or any subsequent marriage. *Sigler, Adm'r, et al. v. Hooker*.....386

WILL.

1. *Contingent Remainder.—Executor Devise.*—Devise to trustees in trust for C. and his family during his life, and, if his wife should survive him, for his wife and his children surviving him, during her widowhood; upon the death of C. and his wife, or his death and the marriage of his widow, thereupon, instantly, and thenceforth the real estate devised to descend, go to, and become the absolute property of the children of C. living at the happening of such contingency, and such others of his children as might thereafter be born, if any, and the children of any deceased child of his; if any child of C., "now in existence, or hereafter born," should die a minor and without heirs of his or her body begotten, or die after majority, intestate and without such heirs, the estate or interest of such child to go to, vest in, and become the property of his or her brothers and sisters and their descendants, and for want of such brothers or sisters, or their descendants, such estate or interest to go to, vest in, and become the property of the cousins of such deceased child, children of J., and their descendants.

Held, that the children of C. took a contingent remainder, and that the limitation to the cousins was void under the rule against perpetuities. *Stephens et al. v. Evans' Adm'z*....39

2. *Same.—Intention of Testator.*—In cases of doubtful construction, the law leans towards vested remainders; but the intention of a testator, where it can be ascertained, governs, whether it result in vested or contingent remainders.....*Ibid.*

3. *Perpetuities.—Rule Against.*—If, by any possibility, the vesting in possession of an estate limited over by way of executory devise may be postponed beyond the period of a life or lives in being and twenty-one years and nine months, the limitation is void; and the rule runs from the death of the testator. *Ibid.*

4. *Same.—Statute.*—The proviso in the eleventh section of the act regulating descents, distribution, and dower, of February 17th, 1838, did not change the rule against perpetuities.....*Ibid.*

5. *Words and Phrases.*—The definitions of words and phrases in section 797 of the code are applied only in the construction of statutes, and not of wills or private instruments. *Cate v. Cranor, Ex'r, et al.*.....292

6. *Construction.*—A clause of a will was as follows: "My further will and desire is, that my executors sell all of my property not above named, and the proceeds, after paying all my just debts and the above named bequests, be divided amongst my sons A., B., C., D., and E., and my daughters F., G., H., and I."

Held, that where the instrument, considered as a whole, indicated that it was the intention of the testator to dispose of his entire estate, or left his intention in this regard in doubt, this clause would dispose of money and the avails of promissory notes and other claims held by the testator at his death, and real estate acquired by him after the execution of the will and owned by him at his decease.....*Ibid.*

7. *Same.*—Any construction which will result in partial intestacy is to be avoided, unless the language of the will compels it.....*Ibid.*

8. *Trust.*—Bequest by J., "that my son S. shall receive of my estate the sum of \$200, to be paid him at the death of my wife, provided my wife shall outlive me; which said \$200 it is my wish my son S. shall add to the advancement he may make to his son R., when R. comes of age."

Held, that the bequest created a trust in favor of R., and that the legacy, received by S., on the death of J.'s wife, from the executor of J., was

- to go to R., on his arriving at majority, whether his father made any advancement to him or not. *Reed's Adm'r v. Reed*.....313
9. *Partition*.—A testator devised to his wife one-third of his real estate in fee and the remaining two-thirds for her life, directed that after her death such remaining two-thirds should be sold, and bequeathed one-half of the proceeds of the sale to a certain church, and the other half to his brother and sisters. *Held*, that the widow might have the portion so devised to her in fee set off to her in severalty in a suit for partition, but that, claiming under the will, she could have no legal interest in the question of the capacity of the church to take under the will after her death. *Lynch v. Leurs, Bishop, &c.*.....411
- WILLFUL INJURY.**
See NEGLIGENCE, 3.
- WITNESS.**
See CONTINUANCE; DEPOSITION; EVIDENCE, 8.
1. *Impeachment*.—*Character*.—Where there has been an attempt to impeach a witness by proof of statements out of court contrary to what he has testified at the trial, the party calling him has the right to sustain him by proof of general good character for truth. *Harris v. The State*.....131
2. *Competency*.—*Suit by Heir*.—In a suit by an heir, to enforce an implied trust in real estate, growing out of the taking of the title by the defendant in his own name, the purchase money having been paid by the plaintiff's ancestor, the defendant is not a competent witness for himself as to any matter occurring prior to the death of such ancestor. *Malady v. McKinney*.....273
3. *Party called by Adversary Party*.—A party called as a witness by the adverse party, to prove a single fact, will be permitted to testify in his own behalf.....*Ibid.*
4. *Decedent's Estates*.—On the trial of a claim against a decedent's estate for the amount of a legacy received by the decedent in his lifetime, in trust for the claimant, the plaintiff is not a competent witness, unless called by the adverse party or by the court. *Reed's Adm'r v. Reed*.....313
5. *Husband and Wife*.—Upon the question whether the wife was a competent witness in a suit by husband and wife for slanderous words spoken of the wife, the court was equally divided. *Ward v. Collyan et ux*.....395
6. *Examination*.—It is not error to allow a party to an action testifying as a witness to state the facts without being interrogated, the adverse party objecting. *King v. Andrew, Esq'*.....429

WORDS.*See WILL*, 5, 6.

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